IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION(CIVIL) NO. 494 of 2012, 797 of 2016 & 342 of 2016

K.S. Puttaswamy(Retd) & Anr. ... Petitioners

Versus

Union of India & Others. ... Respondents

VOLUME -I

COMPILATION

SHRI RAKESH DWIVEDI

SENIOR ADVOCATE

FOR STATE OF GUJARAT

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[425 US 435]

UNITED STATES, Petitioner,

v

MITCHELL MILLER

425 US 435, 48 L Ed 2d 71, 96 S Ct 1619

[No. 74–1179]

Argued January 12, 1976. Decided April 21, 1976.

SUMMARY

Prior to his federal criminal prosecution in the United States District Court for the Middle District of Georgia, the accused moved to suppress copies of checks and other bank records which federal agents had procured when, after the service of subpoenas duces tecum directing the presidents of two banks with which the accused maintained accounts to appear before a grand jury and produce all records of the accused's accounts, the banks, without advising the accused of the subpoenas, ordered their employees to make the pertinent records available and to provide the agents with copies of any documents the agents desired, and the agents, having visited both banks, were shown microfilm records of the accused's accounts maintained by the banks pursuant to the record keeping requirements of the Bank Secrecy Act of 1970 (12 USCS § 1829b(d)), and were given copies of checks, deposit slips, financial statements, and monthly statements pertaining to the accused. Rejecting the accused's contention that the bank documents were illegally seized, the District Court denied the motion to suppress. On appeal following the accused's conviction, the United States Court of Appeals for the Fifth Circuit reversed, holding that the government had violated the Fourth Amendment protection against unreasonable searches and seizures by first requiring the banks to copy all of the accused's checks and then, with an improper invocation of legal process, calling upon the banks to allow inspection and reproduction of those copies (500 F2d 751).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by POWELL, J., expressing the view of seven members of the court, it was held that the motion to suppress had been correctly denied since the accused possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

SUBJECT OF ANNOTATION

Beginning on page 884, infra

Supreme Court's views as to application of Fourth Amendment prohibition against unreasonable searches and seizures to compulsory production of documents

Briefs of Counsel, p 882, infra.

BRENNAN, J., dissented on the grounds that the accused had a reasonable expectation of privacy in his bank statements and records, the voluntary relinquishment of such records by the banks did not constitute a valid consent by the accused, and acquisition of the records was the result of an illegal search and seizure.

MARSHALL, J., dissenting, expressed the view that the Bank Secrecy Act was unconstitutional because its record keeping requirement constituted a seizure of customers' bank records without a warrant and probable cause, and that since the Act was unconstitutional, the government could not rely on records kept pursuant to it in prosecuting a bank customer as the government had done in the case presented.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Search and Seizure §§ 21, 33 — bank records — subpoenas duces tecum — Fourth Amendment interest

1a, 1b, 1c. An accused in a federal prosecution has no Fourth Amendment interest that can be vindicated by a challenge to grand jury subpoenas duces tecum which sought the production of records of the accused's accounts with banks, and, therefore, a Federal District Court properly denies the accused's pre trial motion to suppress copies of checks and other bank records which federal agents procured from the banks when, after the service of the subpoenas and

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10 AM JUR 2d, Banks § 18.5; 68 AM JUR 2d, Searches and Seizures §§ 27, 104

22 AM JUR PL & PR FORMS (Rev ed), Searches and Seizures Forms 71 et seq.

5 AM JUR TRIALS 331, Excluding Illegally Obtained Evidence

12 USCS § 1829b(d); Constitution, 4th Amendment

US L ED DIGEST, Search and Seizure §§ 21, 33

ALR DIGESTS, Search and Seizure §§ 22, 23

L ED INDEX TO ANNOS, Production of Books and Papers; Search and Seizure

ALR QUICK INDEX, Books and Papers; Production of Books and Papers; Search and Seizure

FEDERAL QUICK INDEX, Search and Seizure

ANNOTATION REFERENCES

Supreme Court's views as to application of Fourth Amendment prohibition against unreasonable searches and seizures to compulsory production of documents. 48 L Ed 2d 884.

Supreme Court's view as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure. 96 L Ed 66, 4 L Ed 2d 1999.

without informing the accused of such fact, the banks ordered their employees to make the records available and to provide the agents with copies of any documents they desired, and the agents, having been shown microfilm records of the accused's accounts at the banks, which records the banks maintained pursuant to the record-keeping requirements of the Bank Secrecy Act of 1970 (12 USCS § 1829b(d)), were given copies of checks, deposit slips, financial statements, and monthly statements pertaining to the accused.

[See annotation p 884, infra]

Banks § 1; Search and Seizure § 20 — bank account records — Bank Secrecy Act — private papers

2. Records of an individual's accounts with certain banks, which records the banks maintain in compliance with the record-keeping requirements of the Bank Secrecy Act of 1970 (12 USCS § 1829b(d)), are not the individual's "private papers" protected against compulsory production by the Fourth Amendment, but, instead, are the business records of the banks.

[See annotation p 884, infra]

Search and Seizure § 8 — expectation of privacy — legitimacy — nature of documents

3. The United States Supreme Court must examine the nature of particular documents sought to be protected under the Fourth Amendment from unreasonable search and seizure in order to determine whether there is a legitimate expectation of privacy concerning the contents of the documents which will warrant application of the Fourth Amendment protection.

[See annotation p 884, infra]

Search and Seizure §§ 8, 21 — expectation of privacy — subpoenaed bank records

4. An accused in a federal prosecution has no legitimate expectation of privacy in original checks and deposit slips, nor in the contents of microfilm copies of his checks, deposit slips, financial statements, and monthly statements maintained, pursuant to the record-keeping requirements of the Bank Secrecy Act of 1970 (12 USCS § 1829b(d)), by banks with which the accused had accounts such as to call for Fourth Amendment protection of copies of such documents obtained by federal agents by means of subpoenas duces tecum, since the checks were not confidential communications but negotiable instruments to be used in commercial transactions, and all of the documents obtained, including financial statements and deposit slips, contained only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

[See annotation p 884, infra]

Search and Seizure § 5, 6 — bank records — information to third party — Bank Secrecy Act

5. The mandate of the Bank Secrecy Act of 1970 that records of depositors' transactions be maintained by banks (12 USCS § 1829b(d)) does not alter the rule that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and that the confidence placed in the third party will not be betrayed.

Search and Seizure § 21 — bank records — depositor's rights — subpoenas

6. Even if banks are viewed as acting solely as government agents in keeping records of their depositors' transactions pursuant to the requirements of Bank Secrecy Act of 1970 (12 USCS § 1829b(d)) and in complying without protest with the requirements of subpoenas duces tecum seeking the production of records of depositors' accounts, there is no intrusion upon the depositors' Fourth Amendment rights.

Search and Seizure § 20 — records of third party — subpoena — rights of defendant

7. The issuance of a subpoena to a third party to obtain the records of that party does not violate the Fourth

Amendment rights of the defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued.

Banks § 1; Search and Seizure § 5 — Bank Secrecy Act — record keeping

8. The requirement of the Bank Secrecy Act of 1970 that all banks keep permanent records of their depositors' accounts (12 USCS § 1829b(d)) is not a novel means designed to circumvent established Fourth Amendment rights; it is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.

Search and Seizure § 20 — Bank Secrecy Act — subpoena of records — Fourth Amendment requirements

9. A subpoena issued to a bank to obtain records maintained pursuant to the record-keeping requirements of the Bank Secrecy Act of 1970 (12 USCS § 1829b(d)) is not subject to more stringent Fourth Amendment requirements than is the ordinary subpoena; greater judicial scrutiny, equivalent to that required for a search warrant, is not necessary when a subpoena is to be used to obtain bank records of a depositor's account.

[See annotation p 884, infra]

Search and Seizure § 21 — subpoena duces tecum — Fourth Amendment requirements

10a, 10b. A subpoena duces tecum issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena.

Search and Seizure §§ 24, 26 — search warrant

11a, 11b. A search warrant is issuable only pursuant to prior judicial approval and authorizes government officers to seize evidence without requiring enforcement through the courts.

Appeal and Error § 1692.1 — remand — deferred decision on issue

12. Upon reversing the judgment of a Federal Court of Appeals, which had incorrectly reversed the judgment of a Federal District Court denying the pretrial motion of an accused to supress—for purposes of his prosecution for possessing an unregistered still and non-tax-paid whiskey—copies of checks and other bank records obtained by means of allegedly defective subpoenas duces tecum, the United States Supreme Court will remand to the Court of Appeals for disposition of the issue whether the District Court had improperly overruled the accused's motion to suppress distillery apparatus and raw materials seized from a rented truck, where the Court of Appeals had deferred decision on such issue.

SYLLABUS BY REPORTER OF DECISIONS

Respondent, who had been charged with various federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips, and other records relating to his accounts at two banks, which maintained the records pursuant to the Bank Secrecy Act of 1970 (Act). He contended that the subpoenas duces tecum pursuant to which the material had been produced by the banks were defective and that the records had thus been illegally seized in violation of the Fourth Amendment. Following denial of his motion, respondent was tried and convicted. The Court of Appeals reversed, having concluded that the subpoenaed documents fell within a constitutionally protected zone of privacy. *Held:* Respondent possessed no Fourth Amendment interest in the bank records that could be vindicated by a challenge to the subpoenas, and the District Court therefore did not err in denying the motion to suppress.

(a) The subpoenaed materials were business records of the banks, not respondent's private papers.

(b) There is no legitimate "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications but negotiable instruments to be used in commercial transactions, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. The Act's recordkeeping requirements do not alter these considerations so as to create a protectable Fourth Amendment interest of a bank depositor in the bank's records of his account.

(c) Issuance of a subpoena to a third party does not violate a defendant's rights, even if a criminal prosecution is contemplated at the time the subpoena is issued. California Bankers Assn. v Shultz, 416 US 21, 53.

(d) Access to bank records under the Act is to be controlled by "existing legal process." That does not mean that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is used to obtain a depositor's bank records.

500 F2d 751, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, Rehnquist and Stevens, JJ., joined. Brennan J., post, p 447, 48 L Ed 2d, p 81, and Marshall, J., post, p 455, 48 L Ed 2d, p 86, filed dissenting opinions.

APPEARANCES OF COUNSEL

Lawrence G. Wallace, argued the cause for petitioner.

Denver Lee Rampey, Jr., argued the cause for respondent.

Briefs of Counsel, p 884, infra.

OPINION OF THE COURT

Mr. Justice **Powell** delivered the opinion of the Court.

Respondent was convicted of possessing an unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the Government of whiskey tax, possessing 175 gallons of whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 26 USC §§ 5179, 5205, 5601 et seq. [26 USCS §§ 5179, 5205, 5601 et seq.]; 18 USC § 371 [18 USCS § 371]. Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas duces tecum served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 84 Stat 1114, 12 USC § 1829b(d) [12 USCS § 1829b(d)].

[425 US 437]

[1a] The District Court overruled respondent's motion to suppress, and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

I

On December 18, 1972, in response to an informant's tip, a deputy sheriff from Houston County, Ga., stopped a van-type truck occupied by two of respondent's alleged co-con-

spirators. The truck contained distillery apparatus and raw material. On January 9, 1973, a fire broke out in a Kathleen, Ga., warehouse rented to respondent. During the blaze firemen and sheriff department officials discovered a 7,500-gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia.

Two weeks later agents from the Treasury Department's Alcohol, Tobacco and Firearms Bureau presented grand jury subpoenas issued in blank by the clerk of the District Court, and completed by the United States Attorney's office, to the presidents of the Citizens & Southern National Bank of Warner Robins and the Bank of Byron, where respondent maintained accounts. The subpoenas required the two presidents to appear on January 24, 1973, and to produce

> "all records of accounts, i. e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive
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> Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern National Bank of Warner Robins]."

The banks did not advise respondent that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. At the Bank of Byron, an agent was shown microfilm records of the relevant account and provided with copies of one deposit slip and one or two checks. At the Citizens & Southern National Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements, and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided "one or two" investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were
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defective because they were issued by the United States Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed. 500 F2d 751 (1974). Citing the prohibition in Boyd v United States, 116 US 616, 622, 29 L Ed 746, 6 S Ct 524 (1886), against "com-

pulsory production of a man's private papers to establish a criminal charge against him," the court held that the Government had improperly circumvented Boyd's protections of respondent's Fourth Amendment right against "unreasonable searches and seizures" by "first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies." 500 F2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in California Bankers Assn. v Shultz, 416 US 21, 39 L Ed 2d 812, 94 S Ct 1494 (1974), but noted that access to the records was to be controlled by "existing legal process." See id., at 52, 39 L Ed 2d 812, 94 S Ct 1494. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F2d, at 758.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had the Fourth Amendment interest necessary to entitle him to challenge the validity of the subpoenas duces tecum through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

[425 US 440]

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

[1b] In Hoffa v United States, 385 US 293, 301–302, 17 L Ed 2d 374, 87 S Ct 408 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in Boyd v United States, supra, at 622, 29 L Ed 746, 6 S Ct 524, which describes that Amendment's protection against the "compulsory production of a man's private papers."[1] We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

[2] On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in Boyd, respondent can assert neither ownership nor possession. Instead, these are the business

1. The Fourth Amendment implications of Boyd as it applies to subpoenas duces tecum have been undercut by more recent cases. Fisher v United States, ante, at 407–409, 48 L Ed 2d 39, 96 S Ct 1569 (1976). See infra, at 445–446.

records of the banks. As we said in California Bankers Assn. v Shultz, supra, at 48–49, 39 L Ed 2d 812, 94 S Ct 1494, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of respondent's

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accounts, like "all of the records [which are required to be kept pursuant to the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." Id., at 52, 39 L Ed 2d 812, 94 S Ct 1494.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in California Bankers Assn. v Shultz, supra, at 54, 39 L Ed 2d 812, 94 S Ct 1494, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the combination of the record-keeping requirements of the Act and the issuance of a subpoena[2] to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.[3] Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly reserved

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in California Bankers Assn., supra, at 53–54, and n 24, 39 L Ed 2d 812, 94 S Ct 1494.

[3] Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in Katz v United States, 389 US 347, 353, 19 L Ed 2d 576, 88 S Ct 507 (1967), quoting Warden v Hayden, 387 US 294, 304, 18 L Ed 2d 782, 87 S Ct 1642 (1967), that "we have . . . departed from the narrow view" that "'property interests control the right of the Government to search and seize,'" and that a "search and seizure" become unreasonable when the Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in Katz the Court also stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." 389 US, at 351, 19 L Ed 2d 576, 88 S Ct 507. We must examine the nature of the particular documents sought to be protected in

2. Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a *defective* subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank.

3. It is not clear whether respondent refers to attempts to obtain private documents through a subpoena issued directly to the depositor or through a search pursuant to a warrant. The question whether personal business records may be seized pursuant to a valid warrant is before this Court in No. 74–1646, Andresen v Maryland, 423 US 822, 46 L Ed 2d 39, 96 S Ct 36.

order to determine whether there is a legitimate "expectation of privacy" concerning their contents. Cf. Couch v United States, 409 US 322, 335, 34 L Ed 2d 548, 93 S Ct 611 (1973).

[4] Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records

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to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 USC § 1829b(a)(1) [12 USCS § 1829b(a)(1)]. Cf. Couch v United States, supra, at 335, 34 L Ed 2d 548, 83 S Ct 611.

[5] The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. United States v White, 401 US 745, 751–752, 28 L Ed 2d 453, 91 S Ct 1122 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. Id., at 752, 28 L Ed 2d 453, 91 S Ct 1122; Hoffa v United States, 385 US, at 302, 17 L Ed 2d 374, 87 S Ct 408; Lopez v United States, 373 US 427, 10 L Ed 2d 462, 83 S Ct 1381 (1963).[4]

[6] This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. In California Bankers Assn. v Shultz, 416 US, at 52–53, 39 L Ed 2d 812, 94 S Ct 1494, we rejected the contention that banks, when keeping records of their depositors' transactions pursuant to the Act, are acting solely as agents of the Government. But, even if the banks could be said to have been acting solely as Government agents in transcribing the necessary information and complying without protest[5] with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. See Osborn v United States, 385 US 323, 17 L Ed 2d 394, 87 S Ct 429 (1966); Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424 (1966).

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III

[1c, 7] Since no Fourth Amendment interests of the depositor are implicated here, this case is gov-

4. We do not address here the question of evidentiary privileges, such as that protecting communications between an attorney and his client. Cf. Fisher v United States, ante, at 403–405, 48 L Ed 2d 39, 96 S Ct 1569 (1976).

5. Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

erned by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. California Bankers Assn. v Shultz, supra, at 53, 39 L Ed 2d 812, 94 S Ct 1494; Donaldson v United States, 400 US 517, 537, 27 L Ed 2d 580, 91 S Ct 534 (1971) (Douglas, J., concurring). Under these principles, it was firmly settled, before the passage of the Bank Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation. See First National Bank of Mobile v United States, 267 US 576, 69 L Ed 796, 45 S Ct 231 (1925); affg 295 F 142 (SD Ala 1924). See also California Bankers Assn. v Shultz, supra, at 53, 39 L Ed 2d 812, 94 S Ct 1494; Donaldson v United States, supra, at 522, 27 L Ed 2d 580, 91 S Ct 534.

[8] Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.[6]

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We hold that the District Court correctly denied respondent's motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

IV

[9] Respondent contends not only that the subpoenas duces tecum directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in California Bankers Assn., supra, at 52, 39 L Ed 2d 812, 94 S Ct 1494, that access to the records maintained by banks under the Act is to be controlled by "existing legal process."[7]

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6. Respondent does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in Buckley v Valeo, 424 US 1, 60–82, 46 L Ed 2d 659, 96 S Ct 612 (1976), nor any allegation of an improper inquiry into protected associational activities of the sort presented in Eastland v United States Servicemen's Fund, 421 US 491, 44 L Ed 2d 324, 95 S Ct 1813 (1975).

We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging inquiry that unnecessarily "touch[es] upon intimate areas of an individual's personal affairs." California Bankers Assn. v Shultz, at 78–79, 39 L Ed 2d 812, 94 S Ct 1494 (Powell, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas duces tecum subject to the legal restraints attendant to such process. See Part IV, infra.

7. This case differs from Burrows v Superior Court, 13 Cal 3d 238, 529 P2d 590, (1974), relied on by Mr. Justice Brennan in dissent, in that the bank records of respondent's accounts were furnished in response to "compulsion by legal process" in the form of subpoenas duces tecum. The court in Burrows found it "significant . . . that the bank [in that case] provided the statements to the police in response to an informal oral request for information." 13 Cal 3d, at 243, 529 P2d, at 593.

[10a, 11a] In Oklahoma Press Pub. Co. v Walling, 327 US 186, 208, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946), the Court said that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding

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agency is authorized by law to make and the materials specified are relevant." See also United States v Dionisio, 410 US 1, 11–12, 35 L Ed 2d 67, 93 S Ct 764 (1973). Respondent, citing United States v United States District Court, 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125 (1972), in which we discussed the application of the warrant requirements of the Fourth Amendment to domestic security surveillance through electronic eavesdropping, suggests that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. But in California Bankers Assn. 416 US, at 52, 39 L Ed 2d 812, 94 S Ct 1494, we emphasized only that access to the records was to be in accordance with "existing legal process." There was no indication that a new rule was to be devised, or that the traditional distinction between a search warrant and a subpoena would not be recognized.[8]

In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.[9]

V

[12] The judgment of the Court of Appeals is reversed. The court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress

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distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

SEPARATE OPINIONS

Mr. Justice **Brennan,** dissenting.

The pertinent phrasing of the Fourth Amendment—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"—is virtually in haec verba as Art I, § 19, of the California Constitution—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." The California Supreme Court has reached a conclusion under Art I, § 13, in the same factual situation, contrary to that reached by the Court today under the Fourth

8. **[10b, 11b]** A subpoena duces tecum issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes Government officers to seize evidence without requiring enforcement through the courts. See United States v Dionisio, 410 US 1, 9–10, 35 L Ed 2d 67, 93 S Ct 764 (1973).

9. There is no occasion for us to address whether the subpoenas complied with the requirements outlined in Oklahoma Press Pub. Co. v Walling, 327 US 186, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946). The banks upon which they were served did not contest their validity.

Amendment.[1] I dissent because in my view the California Supreme Court correctly interpreted the relevant constitutional language.

In Burrows v Superior Court, 13 Cal 3d 238, 529 P2d 590 (1974), the question was whether bank statements or copies thereof relating to an accused's bank accounts obtained by the sheriff and prosecutor without

[425 US 448]

benefit of legal process,[2] but with the consent of the bank, were acquired as a result of an illegal search and seizure. The California Supreme Court held that the accused had a reasonable expectation of privacy in his bank statements and records, that the voluntary relinquishment of such records by the bank at the request of the sheriff and prosecutor did not constitute a valid consent by the accused, and that the acquisition by the officers of the records therefore was the result of an illegal search and seizure. In my view the same conclusion, for the reasons stated by the California Supreme Court, is compelled in this case under the practically identical phrasing of the Fourth Amendment. Addressing the threshold question whether the accused's right of privacy was invaded, and relying in part on the decision of the Court of Appeals in this case, Mr. Justice Mosk stated in his excellent opinion for a unanimous court:

"It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable. The prosecution concedes as much, although it asserts that this expectation

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is not constitutionally cognizable. Representatives of several banks testified at the suppression hearing that information in their possession regarding a customer's account is deemed by them to be confidential.

"In the present case, although the record establishes that copies of petitioner's bank statements rather than of his checks were pro-

1. The expectation of privacy relied upon by respondent to support his Fourth Amendment claim is similar to that rejected as to similar documents in Couch v United States, 409 US 322, 34 L Ed 2d 548, 93 S Ct 611 (1973). But in Couch the taxpayer had delivered the documents to her accountant for preparation of income tax returns "knowing that mandatory disclosure of much of the information therein is required in an income tax return." Id., at 335, 34 L Ed 2d 548, 93 S Ct 611; see id., at 337, 34 L Ed 2d 548, 93 S Ct 611 (Brennan, J., concurring). In contrast, in the instant case the banks were obliged only to respond to lawful process, California Bankers Assn. v Shultz, 416 US 21, 52–54, 39 L Ed 2d 812, 94 S Ct 1494 (1974), and had no obligation to disclose the information voluntarily. The expectation of privacy asserted in Fisher v United States, ante, p 391, 48 L Ed 2d 39, 96 S Ct 1569, is distinguishable on similar grounds.

2. The Court distinguishes Burrows on the ground that it involved no legal process, while the instant case involves legal process in the form of subpoenas duces tecum. Ante, at 445 n 7, 48 L Ed 2d 80, 96 S Ct 1619. But the Court also states that the Fourth Amendment issue does not turn on whether the subpoenas were defective. Ante, at 441 n 2, 48 L Ed 2d 78.

In any event, for present purposes I would accept the Court of Appeals' conclusion that the subpoenas in this case were defective. Moreover, although not relied upon by the Court of Appeals, neither the bank nor the Government notified respondent of the disclosure of his records to the Government. In my view, the absence of such notice is not just "unattractive," ante, at 443 n 5, 48 L Ed 2d 79, a fatal constitutional defect inheres in a process that omits provision for notice to the bank customer of an invasion of his protected Fourth Amendment interest.

vided to the officer, the distinction is not significant with relation to petitioner's expectation of privacy. That the bank alters the form in which it records the information transmitted to it by the depositor to show the receipt and disbursement of money on a bank statement does not diminish the depositor's anticipation of privacy in the matters which he confides to the bank. A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes. Thus, we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice.

. . . . .

"The People assert that no illegal search and seizure occurred here because the bank voluntarily provided the statements to the police, and the bank rather than the police conducted the search of its records for papers relating to petitioner's accounts. If, as we conclude above, petitioner has a reasonable expectation of privacy in the bank statements, the voluntary relinquishment of such records by the bank at the request of the police does not constitute

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a valid consent by this petitioner. . . . It is not the right of privacy of the bank but of the petitioner which is at issue, and thus it would be untenable to conclude that the bank, a neutral entity with no significant interest in the matter, may validly consent to an invasion of its depositors' rights. However, if the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail.

"Our rationale is consistent with the recent decision of United States v Miller (5th Cir 1974) 500 F2d 751. In Miller, the United States Attorney, without the defendant's knowledge, issued subpoenas to two banks in which the defendant maintained accounts, ordering the production of 'all records of accounts' in the name of the defendant. The banks voluntarily provided the government with copies of the defendant's checks and a deposit slip; these items were introduced into evidence at the trial which led to his conviction. The circuit court reversed the conviction. It held that the defendant's rights under the Fourth Amendment were violated by the search because the subpoena was issued by the United States Attorney rather than by a court or grand jury, and the bank's voluntary compliance with the subpoena was irrelevant since it was the depositor's right to privacy which was threatened by the disclosure.

"We hold that any bank statements or copies thereof obtained by the sheriff and prosecutor without the benefit of legal process were acquired as the result of an illegal search and seizure (Cal Const, art I, § 13), and that the trial court should have granted the motion to suppress such documents.

[425 US 451]

"The underlying dilemma in this and related cases is that the bank, a detached and disinterested entity, relinquished the records voluntarily. But that circumstance should not be crucial. For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings, bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential. To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.

"Cases are legion that condemn violent searches and invasions of an individual's right to the privacy of his dwelling. The imposition upon privacy, although perhaps not so dramatic, may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have

[425 US 452]

accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices." 13 Cal 3d, at 243–248, 529 P2d, at 593–596 (footnote omitted).

The California Supreme Court also addressed the question of the relevance of California Bankers Assn. v Shultz, 416 US 21, 39 L Ed 2d 812, 94 S Ct 1494 (1974). In my view, for the reasons stated in Burrows, the decision of the Court of Appeals under review today, is in no way inconsistent with California Bankers.[3] The California Supreme Court said:

"[California Bankers] held, in a six-three decision, that the bank's rights under the Fourth Amendment were not abridged by the

3. I continue to believe that the reporting and recordkeeping requirements of the Bank Secrecy Act are unconstitutional. California Bankers Assn. v Shultz, 416 US, at 91, 39 L Ed 2d 812, 94 S Ct 1494 (Brennan, J., dissenting). But I disagree with the Court's reasoning in this case even assuming the constitutionality of the Act, and therefore it is unnecessary for me to rely on the infirmities inherent in the Act.

regulation, and that the depositor plaintiffs lacked standing to challenge the reporting requirement because there was no showing that they engaged in the type of transaction to which the regulation referred.

"The concurring views of two justices who provided the necessary votes to create a majority are of particular interest. Justice Powell's opinion, joined by Justice Blackmun [416 US, at 78, 39 L Ed 2d 812, 94 S Ct 1494] makes clear that a significant extension of the reporting requirement would pose substantial constitutional questions, and that concurrence with the

[425 US 453]

majority was based upon the provisions of the act as narrowed by the regulations. He wrote, 'In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. United States v United States District Court, 407 US 297, 316–317, [32 L Ed 2d 752, 92 S Ct 2125].' [416 US, at 78–79, 39 L Ed 2d 812, 94 S Ct 1494.]

"Justices Douglas and Marshall dissented on the ground that the act violated the Fourth Amendment. Justice Brennan also filed a dissent, stating that the record-keeping and reporting requirements of the act constituted an impermissibly broad grant of power to the Secretary.

". . . [T]he only federal case decided after Shultz and directly confronting the issue of the depositor's rights is entirely consistent with the views we have set forth above. . . . Miller holds that Shultz may not be interpreted as 'proclaiming open season on personal bank records' or as permitting the government to circumvent the Fourth Amendment by first requiring banks to copy their depositors' checks and then calling upon the banks to allow inspection of those copies without appropriate legal process." 13 Cal 3d, at 246–247, 529 P2d, at 595–596 (footnote omitted).

[425 US 454]

I would therefore affirm the judgment of the Court of Appeals. I add only that Burrows strikingly illustrates the emerging trend among high state courts of relying upon state constitutional protections of individual liberties[4]—protections per-

4. See, e.g., cases cited in Baxter v Palmigiano ante, at 339, and n 10, 47 L Ed 2d 810, 96 S Ct 1551 (Brennan, J., dissenting); Michigan v Mosley, 423 US 96, 120–121, 46 L Ed 2d 313, 96 S Ct 321 (1975) (Brennan, J., dissenting). See also Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky LJ 421 (1974); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky LJ 873 (1975); Falk, The State Constitution: A More Than "Adequate" Nonfederal Ground, 61 Cal L Rev 273 (1973); Project Report: Toward an Activist Role for State Bills of Rights, 8 Harv Civ Rights-Civ Lib L Rev 271 (1973). In the past,

vading counterpart provisions of
[425 US 455]
the United States Constitution, but increasingly being ignored by decisions of this Court. For the most recent examples in this Court, but only in the privacy and Fourth Amendment areas, see, e.g., Kelley v Johnson, ante, p 238, 47 L Ed 2d 708, 96 S Ct 1440; Doe v Commonwealth's Atty. post, p 901, 47 L Ed 2d 751, 96 S Ct 1489; Paul v Davis, 424 US 693, 47 L Ed 2d 405, 96 S Ct 1155 (1976); United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976).

Mr. Justice **Marshall,** dissenting.

In California Bankers Assn. v Shultz, 416 US 21, 39 L Ed 2d 812, 94 S Ct 1494 (1974), the Court upheld the constitutionality of the recordkeeping requirement of the Bank Secrecy Act 12 USC § 1829b(d) [12 USCS § 1829b(d)]. I dissented, finding the required maintenance of bank customers' records to be a seizure within the meaning of the Fourth Amendment and unlawful in the absence of a warrant and probable cause. While the Court in California Bankers Assn. did not then purport to decide whether a customer could later challenge the bank's delivery of his records to the Government pursuant to subpoena, I warned:

> "[I]t is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records. . . . By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." 416 US, at 97, 39 L Ed 2d 812, 94 S Ct 1494.

Today, not surprisingly, the Court finds respondent's claims to be made too late. Since the Court in California
[425 US 456]
Bankers Assn. held that a bank, in complying with the requirement that it keep copies of the checks

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it might have been safe for counsel to raise only federal constitutional issues in state courts, but the risks of not raising state-law questions are increasingly substantial, as revealed by a colloquy during argument in Michigan v Mosley, supra:

"QUESTION: Why can't you argue all of this as being contrary to the law and the Constitution of the State of Michigan?

"MR. ZIEMBA: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.

. . . . . .

"QUESTION: Well, you argued the whole thing before.

"MR. ZIEMBA: In the Court of Appeals?

"QUESTION: Yes.

"MR. ZIEMBA: I really did not touch upon —I predicated my entire argument on the Federal Constitution, I must admit that. I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And I may assure this Court that at every opportunity in the future, I shall.

[Laughter.]

"QUESTION: But you hope you don't have that opportunity in this case.

"MR. ZIEMBA: That's right." Tr of Oral Arg 43–44 (OT 1975, No. 74-643).

It would be unwise for counsel to rely on state courts to consider state-law questions sua sponte. But see State v Johnson, 68 NJ 349, 346 A2d 66 (1975).

written by its customers, "neither searches nor seizes records in which the depositor has a Fourth Amendment right," id., at 54, 39 L Ed 2d 812, 94 S Ct 1494, there is nothing new in today's holding that respondent has no protected Fourth Amendment interest in such records. A fortiori, he does not have standing to contest the Government's subpoena to the bank. Alderman v United States, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (1969).

I wash my hands of today's extended redundancy by the Court. Because the recordkeeping requirement of the Act orders the seizure of customers' bank records without a warrant and probable cause, I believe the Act is unconstitutional and that respondent has standing to raise that claim. Since the Act is unconstitutional, the Government cannot rely on records kept pursuant to it in prosecuting bank customers. The Government relied on such records in this case and, because of that, I would affirm the Court of Appeals' reversal of respondent's conviction. I respectfully dissent.

EDITOR'S NOTE

An annotation on "Supreme Court's views as to application of Fourth Amendment prohibition against unreasonable searches and seizures to compulsory production of documents," appears p 884, infra.

[442 US 735]

MICHAEL LEE SMITH, Petitioner,

v

STATE OF MARYLAND

442 US 735, 61 L Ed 2d 220, 99 S Ct 2577

[No. 78–5374]

Argued March 28, 1979. Decided June 20, 1979.

Decision: Phone company's installation and use, at police request, of pen register to record numbers dialed from suspect's home phone, held not to be "search" requiring warrant under Fourth Amendment.

SUMMARY

After a robbery victim had received threatening and obscene telephone calls from a man identifying himself as the robber, the telephone company, at the request of local police who had not obtained a search warrant or a court order, installed a pen register at the company's central offices to record the numbers dialed from a suspect's home telephone. On the basis of certain evidence, including the pen register tape—which established that a call had been made from the suspect's telephone to the victim's telephone—the suspect was indicted and convicted of robbery, his pretrial motion to suppress "all fruits derived from the pen register" on Fourth Amendment grounds having been denied by the Criminal Court of Baltimore, Maryland. The Court of Appeals of Maryland affirmed the conviction, holding that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system, and hence no "search" requiring a warrant under the Fourth Amendment with respect to the use of a pen register at a telephone company's offices. (283 Md 156, 389 A2d 858).

On certiorari, the United States Supreme Court affirmed. In an opinion by BLACKMUN, J., joined by BURGER, Ch. J., and WHITE, REHNQUIST, and STEVENS, JJ., it was held that the installation and use of the pen register at the telephone company's central offices did not constitute a "search" requiring the issuance of a warrant under the Fourth Amendment, made applicable to the states through the Fourteenth Amendment, where the suspect did not have the necessary "legitimate expectation of privacy" regarding the

Briefs of Counsel, p 937, infra.

numbers dialed from his home telephone in that (1) in all probability he entertained no actual expectation of privacy, since (a) it is doubtful that any such expectation is held by telephone users in general who typically know that they must convey numerical information to the phone company, that the company has facilities for recording this information, and that the company, in fact, does so for a variety of legitimate business purposes, and (b) although the fact that the suspect used his home telephone to the exclusion of other telephones may have been calculated to keep the contents of his conversations private, his conduct could not have been intended to protect dialed numbers which he voluntarily conveyed to the telephone company, and (2) even if the suspect had entertained an actual expectation of privacy, such expectation was not one that society is prepared to recognize as reasonable, the suspect, by voluntarily turning over dialed information to the telephone company, having assumed the risk that the company would reveal the information to the police, even though telephone companies normally do not record numbers dialed for local calls.

STEWART, J., joined by BRENNAN, J., dissented, expressing the view that the numbers dialed from a private telephone fall within the constitutional protection of the Fourth and Fourteenth Amendments, and that information obtained by pen register surveillance of a private telephone is information as to which the telephone subscriber has a legitimate expectation of privacy.

MARSHALL, J., joined by BRENNAN, J., dissented, expressing the view that constitutional protections are not abrogated simply because a person apprises a third party of facts valuable in criminal investigations.

POWELL, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Search and Seizure §§ 23, 25 — pen register — use without warrant

1a, 1b. A telephone company's installation and use at its central offices of a pen register to record the numbers dialed from a suspect's home telephone (but not to monitor the contents of the suspect's conversations), which installation and use was requested by local police who had not obtained a warrant or court order authorizing such activity, does not constitute a "search" requiring the issuance of a warrant under the Fourth Amendment, where the suspect did not have the necessary "legitimate expectation of privacy" regarding the numbers recorded by the pen register, in that (1) in all probability he entertained no actual expectation of privacy since (a) it is doubtful that any such expectation is held by telephone users in general who typically know that they must convey numerical information to the telephone company, that the company has facilities for recording this information, and that the company, in fact, does so for a vari-

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68 Am Jur 2d, Searches and Seizures §§ 5, 24, 36; 74 Am Jur 2d, Telecommunications §§ 209, 214

7 Federal Procedural Forms L Ed, Criminal Procedure §§ 20:571 et seq., 20:611 et seq.

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 171 et seq.; 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71 et seq.

17 Am Jur Proof of Facts 1, Tape Recordings as Evidence; 29 Am Jur Proof of Facts 591, Wiretapping; 2 Am Jur Proof of Facts 2d 545, Reliability of Scientific Devices Telephone Calling Line Identification

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, 4th and 14th Amendments

US L Ed Digest, Search and Seizure §§ 23, 25

L Ed Index to Annos, Privacy; Search and Seizure; Telegraphs and Telephones; Wiretapping

ALR Quick Index, Electronic Eavesdropping Device; Interception; Search and Seizure; Telecommunications; Wiretapping

Federal Quick Index, Interception of Communications; Pen Register Devise; Privacy; Search and Seizure; Telephones and Telegraphs

ANNOTATION REFERENCES

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Obtaining evidence by use of sound recordings or of mechanical or electronic eavesdropping device as violation of Fourth Amendment. 17 L Ed 2d 1008.

ety of legitimate business purposes, and (b) although the fact the suspect used the telephone in his house to the exclusion of other telephones may have been calculated to keep the contents of his conversations private, his conduct could not have been intended to protect dialed numbers which he voluntarily conveyed to the company, and (2) even if the suspect had entertained an actual expectation of privacy, such expectation was not one which society is prepared to recognize as reasonable, the suspect, by voluntarily turning over dialed information to the company, having assumed the risk that the company would reveal the information to the police, even though companies normally do not record numbers dialed for local calls. (Stewart, Brennan, and Marshall, JJ., dissented from this holding.)

Search and Seizure §§ 2, 23 — electronic surveillance — Fourth Amendment "search" — reasonable expectation of privacy

2. For purposes of the determination whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment, the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action; such inquiry normally embraces two questions: (1) whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy, that is, whether he has shown that he seeks to preserve something as private; and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable, that is, whether the expectation, viewed objectively, is justifiable under the circumstances.

SYLLABUS BY REPORTER OF DECISIONS

The telephone company, at police request, installed at its central offices a pen register to record the numbers dialed from the telephone at petitioner's home. Prior to his robbery trial, petitioner moved to suppress "all fruits derived from" the pen register. The Maryland trial court denied this motion, holding that the warrantless installation of the pen register did not violate the Fourth Amendment. Petitioner was convicted, and the Maryland Court of Appeals affirmed.

Held: The installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required.

(a) Application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether his expectation is one that society is prepared to recognize as "reasonable." Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507.

(b) Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not "legitimate." First, it is doubtful that telephone users in general have any expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording this information and does in fact record it for various legitimate business purposes. And petitioner did not demonstrate an expectation of privacy merely by using his home phone rather than some other phone, since his conduct, although perhaps calculated to keep the *contents* of his conversation private, was not calculated to preserve the privacy of the number he dialed. Second, even if petitioner did harbor some subjective expectation of privacy, this expectation was not one that society is prepared to recognize as

"reasonable." When petitioner voluntarily conveyed numerical information to the phone company and "exposed" that information to its equipment in the normal course of business, he assumed the risk that the company would reveal the information to the police, cf. United States v Miller, 425 US 435, 48 L Ed 2d 71, 96 S Ct 1619.

283 Md 156, 389 A2d 858, affirmed.

Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and White, Rehnquist, and Stevens, JJ., joined. Stewart and Marshall, JJ., filed dissenting opinions, in which Brennan, J., joined. Powell, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Howard L. Cardin argued the cause for petitioner.

Stephen H. Sachs argued the cause for respondent.

Briefs of Counsel, p 937, infra.

OPINION OF THE COURT

[442 US 736]

Mr. Justice **Blackmun** delivered the opinion of the Court.

[1a] This case presents the question whether the installation and use of a pen register[1] constitutes a "search" within the meaning of the Fourth Amendment,[2] made applicable to the States through the Fourteenth Amendment. Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio Labs 513, 84 ALR2d 933 (1961).

[442 US 737]

I

On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. Tr 66–68. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. On one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home. Id., at 70. On March 16, police spotted a man who met McDonough's description driving a 1975 Monte Carlo in her neighborhood. Id., at 71–72. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith. Id., at 72.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home. Id., at 73, 75. The police did not get a warrant or court order before

1. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." United States v New York Tel. Co. 434 US 159, 161 n 1, 54 L Ed 2d 376, 98 S Ct 364 (1977). A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached. United States v Giordano, 416 US 505, 549 n 1, 40 L Ed 2d 341, 94 S Ct 1820 (1974) (opinion concurring in part and dissenting in part). See also United States v New York Tel. Co. 434 US, at 162, 54 L Ed 2d 376, 98 S Ct 364.

2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const, Amdt 4.

having the pen register installed. The register revealed that on March 17 a call was placed from petitioner's home to McDonough's phone. Id., at 74. On the basis of this and other evidence, the police obtained a warrant to search petitioner's residence. Id., at 75. The search revealed that a page in petitioner's phone book was turned down to the name and number of Patricia McDonough; the phone book was seized. Ibid. Petitioner was arrested, and a six-man lineup was held on March 19. McDonough identified petitioner as the man who had robbed her. Id., at 70–71.

Petitioner was indicted in the Criminal Court of Baltimore for robbery. By pretrial motion, he sought to suppress "all fruits derived from the pen register" on the ground that the police had failed to secure a warrant prior to its installation. Record 14; Tr 54–56. The trial court denied the suppression motion, holding that the warrantless installation of the pen

[442 US 738]

register did not violate the Fourth Amendment. Id., at 63. Petitioner then waived a jury, and the case was submitted to the court on an agreed statement of facts. Id., at 65–66. The pen register tape (evidencing the fact that a phone call had been made from petitioner's phone to McDonough's phone) and the phone book seized in the search of petitioner's residence were admitted into evidence against him. Id., at 74–76. Petitioner was convicted, id., at 78, and was sentenced to six years. He appealed to the Maryland Court of Special Appeals, but the Court of Appeals of Maryland issued a writ of certiorari to the intermediate court in advance of its decision in order to consider whether the pen register evidence had been properly admitted at petitioner's trial. 283 Md 156, 160, 389 A2d 858, 860 (1978).

The Court of Appeals affirmed the judgment of conviction, holding that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company." Id., at 173, 389 A2d, at 867. Because there was no "search," the court concluded, no warrant was needed. Three judges dissented, expressing the view that individuals do have a legitimate expectation of privacy regarding the phone numbers they dial from their homes; that the installation of a pen register thus constitutes a "search"; and that, in the absence of exigent circumstances, the failure of police to secure a warrant mandated that the pen register evidence here be excluded. Id., at 174, 178, 389 A2d, at 868, 870. Certiorari was granted in order to resolve indications of conflict in the decided cases as to the restrictions imposed by the Fourth Amendment on the use of pen registers.[3] 439 US

3. See Application of United States for Order, 546 F2d 243, 245 (CA8 1976), cert denied sub nom Southwestern Bell Tel. Co. v United States, 434 US 1008, 54 L Ed 2d 750, 98 S Ct 716 (1978); Application of United States in Matter of Order, 538 F2d 956, 959–960 (CA2 1976), revd on other grounds sub nom United States v New York Tel Co. 434 US 159, 54 L Ed 2d 376, 98 S Ct 364 (1977); United States v Falcone, 505 F2d 478, 482, and n 21 (CA3 1974), cert denied, 420 US 955, 43 L Ed 2d 432, 95 S Ct 1338 (1975); Hodge v Mountain States Tel. & Tel. Co., 555 F2d 254, 256 (CA9 1977); id., at 266 (concurring opinion); and United States v Clegg, 509 F2d 605, 610 (CA5 1975). In previous decisions, this Court has not found it necessary to consider whether "pen register surveillance [is] subject to the requirements of the Fourth Amendment." United States v New York Tel. Co. 434 US, at

1001, 58 L Ed 2d 676, 99 S Ct 609 (1978).

[442 US 739]

II

A

[2] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment,[4] our lodestar is Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967). In Katz, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places." Id., at 351–353, 19 L Ed 2d 576, 88 S Ct 507. Because the Government's monitoring of Katz' conversation "violated the privacy upon which he justifiably relied while using the telephone booth," the Court held that

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it "constituted a 'search and seizure' within the meaning of the Fourth Amendment." Id., at 353, 19 L Ed 2d 576, 88 S Ct 507.

Consistently with Katz, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. E.g., Rakas v Illinois, 439 US 128, 143, and n 12, 58 L Ed 2d 387, 99 S Ct 421 (1978); id., at 150, 151, 58 L Ed 2d 387, 99 S Ct 421 (concurring opinion); id., at 164, 58 L Ed 2d 387, 99 S Ct 421 (dissenting opinion); United States v Chadwick, 433 US 1, 7, 53 L Ed 2d 538, 97 S Ct 2476 (1977); United States v Miller, 425 US 435, 442, 48 L Ed 2d 71, 96 S Ct 1619 (1976); United States v Dionisio, 410 US 1, 14, 35 L Ed 2d 67, 93 S Ct 764 (1973); Couch v United States, 409 US 322, 335–336, 34 L Ed 2d 548, 93 S Ct 611 (1973); United States v White, 401 US 745, 752, 28 L Ed 2d 453, 91 S Ct 1122 (1971) (plurality opinion); Mancusi v DeForte, 392 US 364, 368, 20 L Ed 2d 1154, 88 S Ct 2120 (1968); Terry v Ohio, 392 US 1, 9, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968). This inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 US, at 361, 19 L Ed 2d 576, 88 S Ct 507—whether, in the words of the Katz majority, the individual has

165 n 7, 54 L Ed 2d 376, 98 S Ct 364. See United States v Giordano, 416 US, at 554 n 4, 40 L Ed 2d 341, 94 S Ct 1820 (opinion concurring in part and dissenting in part).

4. In this case, the pen register was installed, and the numbers dialed were recorded, by the telephone company. Tr 73–74. The telephone company, however, acted at police request. Id., at 73, 75. In view of this, respondent appears to concede that the company is to be deemed an "agent" of the police for purposes of this case, so as to render the installation and use of the pen register "state action" under the Fourth and Fourteenth Amendments. We may assume that "state action" was present here.

shown that "he seeks to preserve [something] as private." Id., at 351, 19 L Ed 2d 576, 88 S Ct 507. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,' " id., at 361, 19 L Ed 2d 576, 88 S Ct 507—whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. Id., at 353, 19 L Ed 2d 576, 88 S Ct 507.[5] See Rakas v Illinois, 439 US, at

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143–144 n 12; 58 L Ed 2d 387, 99 S Ct 421, id., at 151, 58 L Ed 2d 387, 99 S Ct 421 (concurring opinion); United States v White, 401 US, at 752, 28 L Ed 2d 453, 91 S Ct 1122 (plurality opinion).

B

[1b] In applying the Katz analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in Katz, infringed a "legitimate expectation of privacy" that petitioner held. Yet a pen register differs significantly from the listening device employed in Katz, for pen registers do not acquire the *contents* of communications. This Court recently noted:

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." United States v New York Tel. Co. 434 US 159, 167, 54 L Ed 2d 376, 98 S Ct 364 (1977).

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Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First,

5. Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." United States v New York Tel. Co. 434 US, at 174–175, 54 L Ed 2d 376, 98 S Ct 364. Electronic equipment is used, not only to keep billing records of toll calls, but "to keep a record of all calls dialed from a telephone which is subject to a special rate structure." Hodge v Mountain States Tel. & Tel. Co., 555 F2d 254, 266 (CA9 1977) (concurring opinion). Pen registers are regularly employed "to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling." Note, The Legal Constraints upon the Use of the Pen Register as a Law Enforcement Tool, 60 Cornell L Rev 1028, 1029 (1975) (footnotes omitted). Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. See, e.g., Von Lusch v C & P Telephone Co., 457 F Supp 814, 816 (Md 1978); Note, 60 Cornell L Rev, at 1029–1030, n 11; Claerhout, The Pen Register, 20 Drake L Rev 108, 110–111 (1970). Most phone books tell

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subscribers, on a page entitled "Consumer Information," that the company "can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls." E.g., Baltimore Telephone Directory 21 (1978); District of Columbia Telephone Directory 13 (1978). Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Petitioner argues, however, that, whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he "us[ed] the telephone *in his house* to the exclusion of all others." Brief for Petitioner 6 (emphasis added). But the site of the call is immaterial for purposes of analysis in this case. Although petitioner's conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could

make no conceivable difference, nor could any subscriber rationally think that it would.

Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" Katz v United States, 389 US, at 361, 19 L Ed 2d 576, 88 S Ct 507. This Court consistently has held that a person has no legitimate expectation of privacy in information he

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voluntarily turns over to third parties. E.g., United States v Miller, 425 US, at 442–444, 48 L Ed 2d 71, 96 S Ct 1619; Couch v United States, 409 US, at 335–336, 34 L Ed 2d 548, 93 S Ct 611; United States v White, 401 US, at 752, 28 L Ed 2d 453, 91 S Ct 1122; (plurality opinion); Hoffa v United States, 385 US 293, 302, 17 L Ed 2d 374, 87 S Ct 408 (1966); Lopez v United States, 373 US 427, 10 L Ed 2d 462, 83 S Ct 1381 (1963). In Miller, for example, the Court held that a bank depositor has no "legitimate 'expectation of privacy'" in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business." 425 US, at 442, 48 L Ed 2d 71, 96 S Ct 1619. The Court explained:

"The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." Id., at 443, 48 L Ed 2d 71, 96 S Ct 1619.

Because the depositor "assumed the risk" of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. Tr of Oral Arg 3–5, 11–12, 32. We

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are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.

Petitioner argues, however, that automatic switching equipment differs from a live operator in one pertinent respect. An operator, in theory at least, is capable of remembering every number that is conveyed to him by callers. Electronic equipment, by contrast, can "remember" only those numbers it is programmed to record, and telephone companies, in view of their present billing practices, usually do not record local calls. Since petitioner, in calling McDonough, was making a

local call, his expectation of privacy as to her number, on this theory, would be "legitimate."

This argument does not withstand scrutiny. The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. Under petitioner's theory, Fourth Amendment protection would exist, or not, depending on how the telephone company chose to define local-dialing zones, and depending on how it chose to bill its customers for local calls. Calls placed across town, or dialed directly, would be protected; calls placed across the river, or dialed with operator assistance, might not be. We are not inclined to make a crazy quilt of the Fourth Amendment, especially in circumstances where (as here) the pattern of protection would be dictated by billing practices of a private corporation.

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate." The installation and use of a pen register,

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consequently, was not a "search," and no warrant was required. The judgment of the Maryland Court of Appeals is affirmed.

It is so ordered.

Mr. Justice **Powell** took no part in the consideration or decision of this case.

SEPARATE OPINIONS

Mr. Justice **Stewart**, with whom Mr. Justice **Brennan** joins, dissenting.

I am not persuaded that the numbers dialed from a private telephone fall outside the constitutional protection of the Fourth and Fourteenth Amendments.

In Katz v United States, 389 US 347, 352, 19 L Ed 2d 576, 88 S Ct 507, the Court acknowledged the "vital role that the public telephone has come to play in private communication[s]." The role played by a private telephone is even more vital, and since Katz it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected by the Fourth and Fourteenth Amendments. As the Court said in United States v United States District Court, 407 US 297, 313, 32 L Ed 2d 752, 92 S Ct 2125, "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards." (Footnote omitted.)

Nevertheless, the Court today says that those safeguards do not extend to the numbers dialed from a private telephone, apparently because when a caller dials a number the digits may be recorded by the telephone company for billing purposes. But that observation no more than describes the basic nature of telephone calls. A telephone call simply cannot be made without the use of tele-

phone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overhead by the use of other company equipment. Yet we

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have squarely held that the user of even a public telephone is entitled "to assume that the words he utters into the mouthpiece will not be broadcast to the world." Katz v United States, supra, at 352, 19 L Ed 2d 576, 88 S Ct 507.

The central question in this case, is whether a person who makes telephone calls from his home is entitled to make a similar assumption about the numbers he dials. What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself. It is simply not enough to say, after Katz, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police.

I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in Katz.[1] It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy.[2] The information captured by such surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that under Katz

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is entitled to constitutional protection, whether or not it is captured by a trespass into such an area.

The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

I respectfully dissent.

Mr. Justice **Marshall,** with whom Mr. Justice **Brennan** joins, dissenting.

The Court concludes that because individuals have no actual or legiti-

1. It is true, as the Court points out, that under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC §§ 2510–2520, [18 USCS §§ 2510–2520] pen registers are not considered "interceptions" because "they do not acquire the 'contents' of communications," as that term is defined by Congress. United States v New York Tel. Co., 434 US 159, 166–167, 54 L Ed 2d 376, 98 S Ct 364. We are concerned in this case, however, not with the technical definitions of a statute, but with the requirements of the Constitution.

2. The question whether a defendant who is not a member of the subscriber's household has "standing" to object to pen register surveillance of a private telephone is, of course, distinct. Cf. Rakas v Illinois, 439 US 128, 58 L Ed 2d 387, 99 S Ct 421.

mate expectation of privacy in information they voluntarily relinquish to telephone companies, the use of pen registers by government agents is immune from Fourth Amendment scrutiny. Since I remain convinced that constitutional protections are not abrogated whenever a person apprises another of facts valuable in criminal investigations, see, e.g., United States v White, 401 US 745, 786–790, 28 L Ed 2d 453, 91 S Ct 1122 (1971) (Harlan, J., dissenting); id., at 795–796, 28 L Ed 2d 453, 91 S Ct 1122 (Marshall, J., dissenting); California Bankers Assn. v Shultz, 416 US 21, 95–96, 39 L Ed 2d 812, 94 S Ct 1494 (1974) (Marshall, J., dissenting); United States v Miller, 425 US 435, 455–456 48 L Ed 2d 71, 96 S Ct 1619 (1976) (Marshall, J., dissenting), I respectfully dissent.

Applying the standards set forth in Katz v United States, 389 US 347, 361, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Harlan, J., concurring), the Court first determines that telephone subscribers have no subjective expectations of privacy concerning the numbers they dial. To reach this conclusion, the Court posits that individuals somehow infer from the long-distance listings on their phone bills, and from the cryptic assurances of "help" in tracing obscene

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calls included in "most" phone books, that pen registers are regularly used for recording local calls. See ante, at 742–743, 61 L Ed 2d, at 228. But even assuming, as I do not, that individuals "typically know" that a phone company monitors calls for internal reasons, see ante, at 743, 61 L Ed 2d, at 228.[1] it does not follow that they expect this information to be made available to the public in general or the government in particular. Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes. See California Bankers Assn. v Shultz, supra, at 95–96, 39 L Ed 2d 812, 94 S Ct 1494 (Marshall, J., dissenting).

The crux of the Court's holding, however, is that whatever expectation of privacy petitioner may in fact have entertained regarding his calls, it is not one "society is prepared to recognize as 'reasonable.'" Ante, at 743, 61 L Ed 2d, at 229. In so ruling, the Court determines that individuals who convey information to third parties have "assumed the risk" of disclosure to the government. Ante, at 744, 745, 61 L Ed 2d, at 229, 230. This analysis is misconceived in two critical respects.

Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. See, e.g., Lopez v United States, 373 US 427, 439, 10 L Ed 2d 462, 83 S Ct 1381 (1963); Hoffa v

1. Lacking the Court's apparently exhaustive knowledge of this Nation's telephone books and the reading habits of telephone subscribers, see ante, at 742–743, I decline to assume general public awareness of how obscene phone calls are traced. Nor am I persuaded that the scope of Fourth Amendment protection should turn on the concededly "esoteric functions" of pen registers in corporate billing, see ante, at 742, functions with which subscribers are unlikely to have intimate familiarity.

United States, 385 US 293, 302–303, 17 L Ed 2d 374, 87 S Ct 408 (1966); United States v White, supra, at 751–752, 28 L Ed 2d 453, 91 S Ct 1122

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(plurality opinion). By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. Cf. Lopez v United States, supra, at 465–466, 10 L Ed 2d 462, 83 S Ct 1381 (Brennan, J., dissenting). It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.

More fundamentally, to make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections. For example, law enforcement officials could, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, put the public on notice of the risks they would thereafter assume in such communications. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev 349, 384, 407 (1974). Yet, although acknowledging this implication of its analysis, the Court is willing to concede only that, in some circumstances, a further "normative inquiry would be proper." Ante, at 741 n 5, 61 L Ed 2d 227. No meaningful effort is made to explain what those circumstances might be, or why this case is not among them.

In my view, whether privacy expectations are legitimate within the meaning of Katz depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility. As Mr. Justice Harlan, who formulated the standard the Court applies today, himself recognized: "[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not . . . merely recite . . . risks without examining the desirability of saddling them upon society." United States v White, supra, at 786, 28 L Ed 2d 453, 91 S Ct 1122 (dissenting opinion). In making this

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assessment, courts must evaluate the "intrinsic character" of investigative practices with reference to the basic values underlying the Fourth Amendment. California Bankers Assn. v Shultz, supra, at 95, 39 L Ed 2d 812, 94 S Ct 1494 (Marshall, J., dissenting). And for those "extensive intrusions that significantly jeopardize [individuals'] sense of security . . ., more than self-restraint by law enforcement officials is required." United States v White, 401 US, at 786, 28 L Ed 2d 453, 91 S Ct 1122 (Harlan, J., dissenting).

The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, see Katz v United States, 389 US, at 352, 19 L Ed 2d 576, 88 S Ct 507, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with

nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. See NAACP v Alabama, 357 US 449, 463, 2 L Ed 2d 1488, 78 S Ct 1163 (1958); Branzburg v Hayes, 408 US 665, 695, 33 L Ed 2d 626, 92 S Ct 2646 (1972); id., at 728–734, 33 L Ed 2d 626, 92 S Ct 2646 (Stewart, J., dissenting). Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity,[2] I am unwilling to insulate use of pen registers from independent judicial review.

[442 US 752]

Just as one who enters a public telephone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," Katz v United States, supra, at 352, 19 L Ed 2d 576, 88 S Ct 507, so too, he should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes. Accordingly, I would require law enforcement officials to obtain a warrant before they enlist telephone companies to secure information otherwise beyond the government's reach.

2. See, e.g., Reporters Committee For Freedom of Press v American Tel. & Tel. Co., —— US App DC ——, 593 F2d 1030 (1978), cert denied, 440 US 949, 59 L Ed 2d 639, 99 S Ct 1431 (1979); Halperin v Kissinger, 434 F Supp 1193 (DC 1977); Socialist Workers Party v Attorney General, 463 F Supp 515 (SDNY 1978).

[486 US 35]

CALIFORNIA, Petitioner

v

BILLY GREENWOOD and DYANNE VAN HOUTEN

486 US 35, 100 L Ed 2d 30, 108 S Ct 1625

[No. 86-684]

Argued January 11, 1988. Decided May 16, 1988.

Decision: Fourth Amendment held not to prohibit warrantless search and seizure of garbage bags left for collection on curb outside home.

SUMMARY

A police investigator, having received information that an individual might be engaged in drug trafficking, asked the regular trash collector to pick up the plastic trash bags which the individual had left on the curb in front of his house and to turn those bags over to the investigator without mixing their contents with garbage from other houses. The collector complied, cleaning his truck bin of other garbage before he collected the bags in question. Without a warrant, the investigator searched through the contents of those bags and found items indicative of narcotics use, which she then used in obtaining a warrant to search the individual's home where quantities of narcotics were found. A subsequent similar trash search produced further evidence supporting a second search of the house. The Superior Court of Orange County, California, however, dismissed charges against the individual and an alleged accomplice arising from these searches on the grounds (1) that under state precedent such a warrantless trash search violates the Fourth Amendment to the Federal Constitution and similar provisions of the state constitution, and (2) the police would not have had probable cause to search the home without the evidence obtained from the trash searches. In affirming the Superior Court's decision, the California Court of Appeal stated that, while a recent amendment to the state constitution had barred the suppression of evidence seized in violation of state law but not federal law, the state courts were bound by the aforementioned state precedent, holding that the trash search violated federal law, unless and until the United States Supreme Court decided the question differently (182 Cal App 3d 729, 227 Cal Rptr 539). The Supreme Court of California denied the prosecution's petition for review.

Briefs of Counsel, p 942, infra.

CALIFORNIA v GREENWOOD
(1988) 486 US 35, 100 L Ed 2d 30, 108 S Ct 1625

On certiorari, the United States Supreme reversed and remanded. In an opinion by WHITE, J., joined by REHNQUIST, Ch. J., and BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., it was held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage that is left for collection outside the curtilage of a home.

BRENNAN, J., joined by MARSHALL, J., dissented, expressing the view (1) that individuals have a constitutionally protected expectation of privacy in any sealed, opaque container in which they place their personal effects, and (2) that this expectation is not reduced where such containers are used to discard rather than to transport personal effects, scrutiny of another's trash being contrary to accepted notions of civilized behavior.

KENNEDY, J., did not participate.

HEADNOTES
Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 8 — garbage left for collection — warrantless search

1a-1d. The Fourth Amendment does not prohibit the warrantless search and seizure of garbage which has been left for collection outside the curtilage of a home; thus, the Fourth Amendment rights of accused narcotics traffickers are not violated where (1) the accused, as occupants of a house, place their garbage in opaque plastic bags and put those bags out on the street curb for collection at a fixed time, with the expectation that the garbage collector will pick up the bags, mingle them with the trash of others, and deposit them at the garbage dump, but (2) the garbage collector instead, at the request of a police investigator, picks up the accused's garbage bags after cleaning his truck bin of other garbage and turns the bags over to the investigator, and (3) the investigator, acting without a warrant, searches through the garbage bags and uses evidence found therein to support an application for a warrant to search the house; although the accused may not have expected that the contents of their garbage bags would become known to the public, such a search violates the Fourth Amendment only if the accused have manifested a subjective expectation of privacy that society accepts as objectively reasonable, and under these circumstances the accused do not have such a reasonable expectation of privacy but have exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection, given that (1) it is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public, and (2) the occupants place their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who could sort through the trash or permit others, such as the police, to do so. (Brennan and Marshall, JJ., dissented from this holding.)

Search and Seizure § 5 — reasonable expectation of privacy

2. An expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable.

Search and Seizure § 8 — things exposed to public

3. The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public, and hence what a person knowingly exposes to the public, even in his or her own home or office, is not a subject of Fourth Amendment protection.

Search and Seizure §§ 5, 8 — effect of state privacy law — search of garbage

4a, 4b. Concepts of privacy under the laws of each state do not determine the reach of the Fourth Amendment; an individual's expectation of privacy in garbage which he or she has put in plastic garbage bags and left on the curb outside his or her home for collection is not to be deemed reasonable as a matter of federal constitutional law on the ground that the warrantless search

and seizure of such garbage is impermissible as a matter of state law.

Criminal Law § 46 — rights of accused — state constraints on police

5. Individual states have the power to construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.

Constitutional Law §§ 518, 840 — due process — exclusionary rule — state power to define

6. A state constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law does not violate the due process clause of the Federal Constitution's Fourteenth Amendment; a state has the power to eliminate the exclusionary rule as a remedy for violations of a state constitutional right against warrantless searches of trash; the states are not foreclosed by the Fourteenth Amendment's due process clause from balancing the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity in delineating the scope of their exclusionary rules, and hence the people of a state can permissibly conclude that those benefits do not outweigh those costs when the police conduct at issue does not violate federal law.

SYLLABUS BY REPORTER OF DECISIONS

Acting on information indicating that respondent Greenwood might be engaged in narcotics trafficking, police twice obtained from his regular trash collector garbage bags left on the curb in front of his house. On the basis of items in the bags which were indicative of narcotics use, the police obtained warrants to search the house, discovered controlled substances during the searches, and arrested respondents on felony narcotics charges. Finding that probable cause to search the house would not have existed without the evidence obtained from the trash searches, the State Superior Court dismissed the charges under People v Krivda, 5 Cal 3d 357, 486 P2d 1262, which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. Although noting a post-Krivda state constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state, but not federal, law, the State Court of Appeal affirmed on the ground that Krivda was based on federal, as well as state, law.

Held:

1. The Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home.

(a) Since respondents voluntarily left their trash for collection in an area particularly suited for public inspection, their claimed expectation of privacy in the inculpatory items they discarded was not objectively reasonable. It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through it or permitted others, such as the police, to do so. The police cannot reasonably be expected to avert their eyes from the evidence of criminal

activity that could have been observed by any member of the public.

(b) Greenwood's alternative argument that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law under Krivda, which he contends survived the state constitutional amendment, is without merit. The reasonableness of a search for Fourth Amendment purposes does not depend upon privacy concepts embodied in the law of the particular State in which the search occurred; rather, it turns upon the understanding of society as a whole that certain areas deserve the most scrupulous protection from government invasion. There is no such understanding with respect to garbage left for collection at the side of a public street.

2. Also without merit is Greenwood's contention that the California constitutional amendment violates the Due Process Clause of the Fourteenth Amendment. Just as this Court's Fourth Amendment exclusionary rule decisions have not required suppression where the benefits of deterring minor police misconduct were overbalanced by the societal costs of exclusion, California was not foreclosed by the Due Process Clause from concluding that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.

182 Cal App 3d 729, 227 Cal Rptr 539, reversed and remanded.

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Blackmun, Stevens, O'Connor, and Scalia, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. Kennedy, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Michael J. Pear argued the cause for petitioner.

Michael Ian Garey argued the cause for respondents.

Briefs of Counsel, p 942, infra.

OPINION OF THE COURT

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Justice **White** delivered the opinion of the Court.

[1a] The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

I

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehi-

cles remained at Greenwood's house for only a few minutes.

Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late-night and early-morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics trafficking location.

On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish

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and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they executed the warrant. Greenwood was again arrested.

The Superior Court dismissed the charges against respondents on the authority of People v Krivda, 5 Cal 3d 357, 486 P2d 1262 (1971), which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. The court found that the police would not have had probable cause to search the Greenwood home without the evidence obtained from the trash searches.

The Court of Appeal affirmed. 182 Cal App 3d 729, 227 Cal Rptr 539 (1986). The court noted at the outset that the fruits of warrantless trash searches could no longer be suppressed if Krivda were based only on the California Constitution, because since 1982 the State has barred the suppression of evidence seized in violation of California law but not federal law. See Cal Const, Art I, § 28(d); In re Lance W., 37 Cal 3d 873, 694 P2d 744 (1985). But Krivda, a decision binding on the Court of Appeal, also held that the fruits of warrantless trash searches were to be excluded under federal

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law. Hence, the Superior Court was correct in dismissing the charges

against respondents. 182 Cal App 3d, at 735, 227 Cal Rptr, at 542.[1]

The California Supreme Court denied the State's petition for review of the Court of Appeal's decision. We granted certiorari, 483 US 1019, 97 L Ed 2d 760, 107 S Ct 3260, and now reverse.

II

[1b] The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. O'Connor v Ortega, 480 US 709, 715, 94 L Ed 2d 714, 107 S Ct 1492 (1987); California v Ciraolo, 476 US 207, 211, 90 L Ed 2d 210, 106 S Ct 1809 (1986); Oliver v United States, 466 US 170, 177, 80 L Ed 2d 214, 104 S Ct 1735 (1984); Katz v United States, 389 US 347, 361, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Harlan, J., concurring). Respondents do not disagree with this standard.

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

[1c, 2] It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection,

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however, unless society is prepared to accept that expectation as objectively reasonable.

[1d] Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals,[2] children, scavengers,[3] snoops,[4] and other members

1. The Court of Appeal also held that respondent Van Houten had standing to seek the suppression of evidence discovered during the April 4 search of Greenwood's home. 182 Cal App 3d, at 735, 227 Cal Rptr, at 542-543.

2. For example, State v Ronngren, 361 NW2d 224 (ND 1985), involved the search of a garbage bag that a dog, acting "at the behest of no one," id., at 228, had dragged from the defendants' yard into the yard of a neighbor. The neighbor deposited the bag in his own trash can, which he later permitted the police to search. The North Dakota Supreme Court held that the search of the garbage bag did not violate the defendants' Fourth Amendment rights.

3. It is not only the homeless of the Nation's cities who make use of others' refuse. For example, a nationally syndicated consumer columnist has suggested that apartment dwellers obtain cents-off coupons by "mak[ing] friends with the fellow who handles the trash" in their buildings, and has recounted the tale of "the 'Rich lady' from Westmont who once a week puts on rubber gloves and hip boots and wades into the town garbage dump looking for labels and other proofs of purchase" needed to obtain manufacturers' refunds. M. Sloane, "The Supermarket Shopper's" 1980 Guide to Coupons and Refunds 74, 161 (1980).

4. Even the refuse of prominent Americans has not been invulnerable. In 1975, for example, a reporter for a weekly tabloid seized five bags of garbage from the sidewalk outside the home of Secretary of State Henry Kissinger. Washington Post, July 9, 1975, p A1, col 8. A newspaper editorial criticizing this journalis-

of the public. See Krivda, 5 Cal 3d, at 367, 486 P2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for

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public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," United States v Reicherter, 647 F2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

[3] Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v United States, supra, at 351, 19 L Ed 2d 576, 88 S Ct 507. We held in Smith v Maryland, 442 US 735, 61 L Ed 2d 220, 99 S Ct 2577 (1979), for example, that the police did not violate the Fourth Amendment by causing a pen register to be installed at the telephone company's offices to record the telephone numbers dialed by a criminal suspect. An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers to the telephone company when he uses the telephone. Again, we observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Id., at 743-744, 61 L Ed 2d 220, 99 S Ct 2577.

Similarly, we held in California v Ciraolo, supra, that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." Id., at 213-214, 90 L Ed 2d 210, 106 S Ct 1809.

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. See United States v Dela Espriella,

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781 F2d 1432, 1437 (CA9 1986); United States v O'Bryant, 775 F2d 1528, 1533-1534 (CA11 1985); United States v Michaels, 726 F2d 1307, 1312-1313 (CA8), cert denied, 469 US 820, 83 L Ed 2d 38, 105 S Ct 92 (1984); United States v Kramer, 711 F2d 789, 791-

tic "trash-picking" observed that "[e]vidently . . . 'everybody does it.'" Washington Post, July 10, 1975, p A18, col 1. We of course do not, as the dissent implies, "bas[e] [our] conclusion" that individuals have no reasonable expectation of privacy in their garbage on this "sole incident." Post, at 51, 100 L Ed 2d, at 44.

794 (CA7), cert denied, 464 US 962, 78 L Ed 2d 339, 104 S Ct 397 (1983); United States v Terry, 702 F2d 299, 308-309 (CA2), cert denied sub nom Williams v United States, 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095 (1983); United States v Reicherter, supra, at 399; United States v Vahalik, 606 F2d 99, 100-101 (CA5 1979) (per curiam), cert denied, 444 US 1081, 62 L Ed 2d 765, 100 S Ct 1034 (1980); United States v Crowell, 586 F2d 1020, 1025 (CA4 1978), cert denied, 440 US 959, 59 L Ed 2d 772, 99 S Ct 1500 (1979); Magda v Benson, 536 F2d 111, 112-113 (CA6 1976) (per curiam); United States v Mustone, 469 F2d 970, 972-974 (CA1 1972). In United States v Thornton, 241 US App DC 46, 56, and n 11, 746 F2d 39, 49, and n 11 (1984), the court observed that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege [sic] thereof." In addition, of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas. See Commonwealth v Chappee, 397 Mass 508, 512-513, 492 NE2d 719, 721-722 (1986); Cooks v State, 699 P2d 653, 656 (Okla Crim), cert denied, 474 US 935, 88 L Ed 2d 275, 106 S Ct 268 (1985); State v Stevens, 123 Wis 2d 303, 314-317, 367 NW2d 788, 794-797, cert denied, 474 US 852, 88 L Ed 2d 125, 106 S Ct 151 (1985); State v Ronngren, 361 NW2d 224, 228-230 (ND 1985); State v Brown, 20 Ohio App 3d 36, 37-38, 484 NE2d 215, 217-218 (1984); State v Oquist, 327 NW2d 587 (Minn 1982); People v Whotte, 113 Mich App 12, 317 NW2d 266 (1982); Commonwealth v Minton, 288 Pa Super 381, 391, 432 A2d 212, 217 (1981); State v Schultz, 388 So 2d 1326 (Fla App 1980); People v Huddleston, 38 Ill App 3d 277, 347 NE2d 76 (1976); Willis v State, 518 SW2d 247, 249 (Tex Crim App 1975); Smith v State, 510 P2d 793 (Alaska), cert denied,

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414 US 1086, 38 L Ed 2d 489, 94 S Ct 603 (1973); State v Fassler, 108 Ariz 586, 592-593, 503 P2d 807, 813-814 (1972); Croker v State, 477 P2d 122, 125-126 (Wyo 1970); State v Purvis, 249 Ore 404, 411, 438 P2d 1002, 1005 (1968). But see State v Tanaka, 67 Haw 658, 701 P2d 1274 (1985); People v Krivda, 5 Cal 3d 729, 486 P2d 1262 (1971).[5]

III

[4a] We reject respondent Greenwood's alternative argument for affirmance: that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law. He urges that the state-law right of Californians to privacy in their garbage, announced by the California Supreme Court in Krivda, supra, survived the subsequent state constitutional amendment eliminating the suppression remedy as a means of enforcing that right. See In re Lance W., 37 Cal 3d, at 886-887, 694 P2d, at 752-753. Hence, he argues that the Fourth Amendment should itself vindicate that right.

5. Given that the dissenters are among the tiny minority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that "society will be shocked to learn" of today's decision. Post, at 46, 100 L Ed 2d, at 40.

[4b, 5] Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs. We have emphasized instead that the Fourth Amendment analysis must turn on such factors as "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." Oliver v United States, 466 US, at 178, 80 L Ed 2d 214, 104 S Ct 1735 (emphasis added). See also Rakas v Illinois, 439 US 128, 143-144, n 12, 58 L Ed 2d 387, 99 S Ct 421 (1978). We have already concluded that society as a whole possesses no such understanding

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with regard to garbage left for collection at the side of a public street. Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

IV

[6] Greenwood finally urges as an additional ground for affirmance that the California constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law violates the Due Process Clause of the Fourteenth Amendment. In his view, having recognized a state-law right to be free from warrantless searches of garbage, California may not under the Due Process Clause deprive its citizens of what he describes as "the only effective deterrent" to violations of this right. Greenwood concedes that no direct support for his position can be found in the decisions of this Court. He relies instead on cases holding that individuals are entitled to certain procedural protections before they can be deprived of a liberty or property interest created by state law. See Hewitt v Helms, 459 US 460, 74 L Ed 2d 675, 103 S Ct 864 (1983); Vitek v Jones, 445 US 480, 63 L Ed 2d 552, 100 S Ct 1254 (1980).

We see no merit in Greenwood's position. California could amend its Constitution to negate the holding in Krivda that state law forbids warrantless searches of trash. We are convinced that the State may likewise eliminate the exclusionary rule as a remedy for violations of that right. At the federal level, we have not required that evidence obtained in violation of the Fourth Amendment be suppressed in all circumstances. See, e.g., United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (1984); United States v Janis, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021 (1976); United States v Calandra, 414 US 338, 38 L Ed 2d 561, 94 S Ct 613, 66 Ohio Ops 2d 320 (1974). Rather, our decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. See Leon, 468 US, at 908-913, 82 L Ed 2d 677, 104 S Ct 3405. We

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have declined to apply the exclusionary rule indiscriminately "when law enforcement officers have acted in objective good faith or their transgressions have been minor," because "the magnitude of the benefit conferred on . . . guilty defendants [in such circumstances] offends basic

concepts of the criminal justice system." Id., at 908, 82 L Ed 2d 677, 104 S Ct 3405 (citing Stone v Powell, 428 US 465, 490, 49 L Ed 2d 1067, 96 S Ct 3037 (1976)).

The States are not foreclosed by the Due Process Clause from using a similar balancing approach to delineate the scope of their own exclusionary rules. Hence, the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.

V

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice **Kennedy** took no part in the consideration or decision of this case.

SEPARATE OPINION

Justice **Brennan,** with whom Justice **Marshall** joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Record 113. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore,

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that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

I

"A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." United States v Jacobsen, 466 US 109, 120, n 17, 80 L Ed 2d 85, 104 S Ct 1652 (1984) (citations omitted). Thus, as the Court observes, if Greenwood had a reasonable expectation that the contents of the bags that he placed on the curb would remain private, the warrantless search of those bags violated the Fourth Amendment. Ante, at 39, 100 L Ed 2d, at 36.

The Framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects"—no less than "unreasonable searches" of "person[s] and houses"—infringe privacy. As early as 1878, this Court acknowledged that the contents of "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles." Ex parte Jackson, 96 US 727, 733, 24 L Ed 877. In short, so long as a package is "closed against inspection,"

the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search in one's own household." Ibid. Accord, United States v Van Leeuwen, 397 US 249, 25 L Ed 2d 282, 90 S Ct 1029 (1970).

With the emergence of the reasonable-expectation-of-privacy analysis, see Katz v United States, 389 US 347, 361, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Harlan, J., concurring); Smith v Maryland, 442 US 735, 740, 61 L Ed 2d 220, 99 S Ct 2577 (1979), we have reaffirmed this fundamental principle. In Robbins v California, 453 US 420, 69 L Ed 2d 744, 101 S Ct 2841 (1981), for example, Justice Stewart, writing for a plurality of four, pronounced that "unless the container is such that its contents may be said to be in plain view, those contents are fully

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protected by the Fourth Amendment," id., at 427, 69 L Ed 2d 744, 101 S Ct 2841, and soundly rejected any distinction for Fourth Amendment purposes among various opaque, sealed containers:

> "[E]ven if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. . . . And . . . no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box." Id., at 426-427, 69 L Ed 2d 744, 101 S Ct 2841.

See also id., at 428, 69 L Ed 2d 744, 101 S Ct 2841 (expectation of privacy attaches to any container unless it "so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer"). With only one exception, every Justice who wrote in that case eschewed any attempt to distinguish "worthy" from "unworthy" containers.[1]

More recently, in United States v Ross, 456 US 798, 72 L Ed 2d 572, 102 S Ct 2157 (1982), the Court, relying on the "virtually unanimous agreement

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in Robbins . . . that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper," held that a distinction among "paper bags, locked

1. See 453 US, at 436, 69 L Ed 2d 744, 101 S Ct 2841 (Blackmun, J., dissenting); id., at 437, 69 L Ed 2d 744, 101 S Ct 2841 (Rehnquist, J., dissenting); id., at 444, 69 L Ed 2d 744, 101 S Ct 2841 (Stevens, J., dissenting). But see id., at 433-434, 69 L Ed 2d 744, 101 S Ct 2841 (Powell, J., concurring in judgment) (rejecting position that all containers, even "the most trivial," like "a cigarbox or a Dixie cup," are entitled to the same Fourth Amendment protection). Cf. New York v Belton, 453 US 454, 460-461, n 4, 69 L Ed 2d 768, 101 S Ct 2860 (1981) (defining "container," for purposes of search incident to a lawful custodial arrest, as "any object capable of holding another object," including "luggage, boxes, bags, clothing, and the like").

In addition to finding that Robbins had a reasonable expectation of privacy in his duffelbag and plastic-wrapped packages, the Court also held that the automobile exception to the warrant requirement, see Carroll v United States, 267 US 132, 153, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), did not apply to packages found in an automobile. The Court overruled the latter determination in United States v Ross, 456 US 798, 72 L Ed 2d 572, 102 S Ct 2157 (1982), but reaffirmed that where, as here, the automobile exception is inapplicable, police may not conduct a warrantless search of any container that conceals its contents.

trunks, lunch buckets, and orange crates" would be inconsistent with

> "the central purpose of the Fourth Amendment. . . . [A] traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.
>
> "As Justice Stewart stated in Robbins, the Fourth Amendment provides protection to the owner of *every container that conceals its contents from plain view*." Id., at 822-823, 72 L Ed 2d 572, 102 S Ct 2157 (emphasis added; footnote and citation omitted).

See also Jacobsen, 466 US, at 129, 80 L Ed 2d 85, 104 S Ct 1652 (opinion of White, J.).

Accordingly, we have found a reasonable expectation of privacy in the contents of a 200-pound "double-locked footlocker," United States v Chadwick, 433 US 1, 11, 53 L Ed 2d 538, 97 S Ct 2476 (1977); a "comparatively small, unlocked suitcase," Arkansas v Sanders, 442 US 753, 762, n 9, 61 L Ed 2d 235, 99 S Ct 2586 (1979); a "totebag," Robbins, 453 US, at 422, 69 L Ed 2d 744, 101 S Ct 2841; and "packages wrapped in green opaque plastic," ibid. See also Ross, supra, at 801, 822-823, 72 L Ed 2d 572, 102 S Ct 2157 (suggesting that a warrant would have been required to search a "'lunch-type' brown paper bag" and a "zippered red leather pouch" had they not been found in an automobile); Jacobsen, supra, at 111, 114-115, 80 L Ed 2d 85, 104 S Ct 1652 (suggesting that a warrantless search of an "ordinary cardboard box wrapped in brown paper" would have violated the Fourth Amendment had a private party not already opened it).

Our precedent, therefore, leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags —identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as Fourth Amendment protection is concerned, opaque plastic bags are every bit as

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worthy as "packages wrapped in green opaque plastic" and "double-locked footlocker[s]." Cf. Robbins, supra, at 441, 69 L Ed 2d 744, 101 S Ct 2841 (Rehnquist, J., dissenting) (objecting to Court's discovery of reasonable expectation of privacy in contents of "two plastic garbage bags").

II

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.[2]

2. Both to support its position that society recognizes no reasonable privacy interest in sealed, opaque trash bags and to refute the prediction that "society will be shocked to learn" of that conclusion, supra, at 46, 100 L Ed 2d, at 40, the Court relies heavily upon a collection of lower court cases finding no Fourth Amendment bar to trash searches. But the authority that leads the Court to be "distinctly unimpressed" with our position, ante, at 43, n 5, 100 L Ed 2d, at 38, is itself impressively undistinguished. Of 11 Federal Court of Appeals cases cited by the Court, at least 2 are factually or legally distinguishable, see United States v O'Bryant, 775 F2d 1528, 1533-1534 (CA11 1985) (police may search an apparently valuable briefcase "discarded next to an overflowing trash bin on a busy city

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A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore . . . inevitably associated with the expectation of privacy." Sanders, supra, at 762, 61 L Ed 2d 235, 99 S Ct 2586 (citing Chadwick, supra, at 13, 53 L Ed 2d 538, 97 S Ct 2476). "[A]lmost every human activity ultimately manifests itself in waste products. . . ." Smith v State, 510 P2d 793, 798 (Alaska), cert denied, 414 US 1086, 38 L Ed 2d 489, 94 S Ct 603 (1973). See California v Rooney, 483 US 307, 320-321, n 3, 97 L Ed 2d 258, 107 S Ct 2852 (1987) (White, J., dissenting) (renowned archaeologist Emil Haury once said, "[i]f you want to know what is really going on in a community, look at its garbage") (quoted by W. Rathje, Archaeological Ethnography . . . Because Sometimes It Is Better To Give than to Receive, in Explorations in Ethnoarchaeology 49, 54 (R. Gould ed 1978)); Weberman, The Art of Garbage Analysis: You Are What You Throw Away, 76 Esquire 113 (1971) (analyzing trash of various celebrities and drawing conclusions about their private lives). A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed

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to protect. Oliver v United States, 466 US 170, 180, 80 L Ed 2d 214, 104 S Ct 1735 (1984) (quoting Boyd v United States, 116 US 616, 630, 29 L Ed 746, 6 S Ct 524 (1886)). See also United States v

street"); United States v Thornton, 241 US App DC 46, 56, 746 F2d 39, 49(1984) (reasonable federal agents could believe in good faith that a trash search is legal), and 7 rely entirely or almost entirely on an abandonment theory that, as noted infra, at 51, 100 L Ed 2d, at 44, the Court has discredited, see United States v Dela Espriella 781 F2d 1432, 1437(CA9 1986) ("The question, then, becomes whether placing garbage for collection constitutes abandonment of property"); United States v Terry, 702 F2d 299, 308-309 (CA2) ("[T]he circumstances in this case clearly evidence abandonment by Williams of his trash"), cert denied sub nom Williams v United States, 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095 (1983); United States v Reicherter, 647 F2d 397, 399 (CA3 1981) ("[T]he placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment"); United States v Vahalik, 606 F2d 99, 100-101 (CA5 1979) (per curiam) ("[T]he act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection"), cert denied, 444 US 1081, 62 L Ed 2d 765, 100 S Ct 1034 (1980); United States v Crowell, 586 F2d 1020, 1025 (CA4 1978) ("The act of placing [garbage] for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment"), cert denied, 440 US 959, 59 L Ed 2d 772, 99 S Ct 1500 (1979); Magada v Benson 536 F2d 111, 112 (CA6 1976) (per curiam) ("[F]ederal case law . . . holds that garbage . . . is abandoned and no longer protected by the Fourth Amendment"); United States v Mustone, 469 F2d 970, 972 (CA1 1972) (when defendant "deposited the bags on the sidewalk he abandoned them"). A reading of the Court's collection of state-court cases reveals an equally unimpressive pattern.

Dunn, 480 US 294, 300, 94 L Ed 2d 326, 107 S Ct 1134 (1987).

The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy. As the author of the Court's opinion observed last Term, a defendant's "property interest [in trash] does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law." Rooney, supra, at 320, 97 L Ed 2d 258, 107 S Ct 2852 (White, J., dissenting). In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags would not be invaded, the Court has held that we must look to "understandings that are recognized and permitted by society."[3] Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives. See State v Schultz, 388 So 2d 1326, 1331 (Fla App 1980) (Anstead, J., dissenting). That was, quite naturally, the reaction to the sole incident on which the Court bases its conclusion that "snoops" and the like defeat the expectation of privacy in trash. Ante, at 40, 100 L Ed 2d, at 36, and n 4. When a tabloid reporter examined then-Secretary of State

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Henry Kissinger's trash and published his findings, Kissinger was "really revolted" by the intrusion and his wife suffered "grave anguish." N.Y. Times, July 9, 1975, p A1, col 8. The public response roundly condemning the reporter demonstrates that society not only recognized those reactions as reasonable, but shared them as well. Commentators variously characterized his conduct as "a disgusting invasion of personal privacy," Flieger, Investigative Trash, US News & World Report, July 28, 1975, p 72 (editor's page); "indefensible . . . as civilized behavior," Washington Post, July 10, 1975, p A18, col 1 (editorial); and contrary to "the way decent people behave in relation to each other," ibid.

Beyond a generalized expectation of privacy, many municipalities, whether for reasons of privacy, sanitation, or both, reinforce confidence in the integrity of sealed trash containers by "prohibit[ing] anyone, except authorized employees of the Town . . ., to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on . . . any public street for collection." United States v Dzialak, 441 F2d 212, 215 (CA2 1971) (paraphrasing ordinance for town of Cheektowaga, New York). See also United States v Vahalik, 606 F2d 99, 100 (CA5 1979) (per curiam); Magda v Benson, 536 F2d 111, 112 (CA6 1976)

3. Rakas v Illinois, 439 US 128, 143-144, n 12, 58 L Ed 2d 387, 99 S Ct 421 (1978). See ante, at 43, 100 L Ed 2d, at 39 ("[T]he Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion' ") (quoting Oliver v United States, 466 US 170, 178, 80 L Ed 2d 214, 104 S Ct 1735 (1984)); Robbins v California, 453 US 420, 428, 69 L Ed 2d 744, 101 S Ct 2841 (1981) (plurality opinion) ("[E]xpectations of privacy are established by general social norms"); Dow Chemical Co. v United States, 476 US 227, 248, 90 L Ed 2d 226, 106 S Ct 1819 (1986) (opinion of Powell, J.); Bush & Bly, Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after Katz v United States, 23 Ariz L Rev 283, 293 (1981) ("[S]ocial custom . . . serves as the most basic foundation of a great many legitimate privacy expectations") (citation omitted).

(per curiam); People v Rooney, 175 Cal App 3d 634, 645, 221 Cal Rptr 49, 56 (1985), cert dism'd, 483 US 307, 97 L Ed 2d 258, 107 S Ct 2852 (1987); People v Krivda, 5 Cal 3d 357, 366, vacated and 486 P2d 1262, 1268 (1971), vacated and remanded, 409 US 33, 34 L Ed 2d 45, 93 S Ct 32 (1972); State v Brown, 20 Ohio App 3d 36, 38, n 3, 484 NE2d 215, 218, n 3 (1984). In fact, the California Constitution, as interpreted by the State's highest court, guarantees a right of privacy in trash vis-a-vis government officials. See Krivda, supra (recognizing right); In re Lance W., 37 Cal 3d 873, 886-887, 694 P2d 744, 752-753 (1985) (later constitutional amendment abolished exclusionary remedy but left intact the substance of the right).

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That is not to deny that isolated intrusions into opaque, sealed trash containers occur. When, acting on their own, "animals, children, scavengers, snoops, [or] other members of the public," ante, at 40, 100 L Ed 2d, at 36-37 (footnotes omitted), *actually* rummage through a bag of trash and expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," ante, at 41, 100 L Ed 2d, at 37. That much follows from cases like Jacobsen, 466 US, at 117, 120, n 17, 80 L Ed 2d 85, 104 S Ct 1652 (emphasis added), which held that police may constitutionally inspect a package whose "integrity" a private carrier has *already* "compromised," because "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not *already* been frustrated"; and California v Ciraolo, 476 US 207, 213-214, 90 L Ed 2d 210, 106 S Ct 1809 (1986) (emphasis added), which held that the Fourth Amendment does not prohibit police from observing what "[a]ny member of the public flying in this airspace who glanced down *could* have seen."

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood's, we would have a different case. But all that Greenwood "exposed . . . to the public," ante, at 40, 100 L Ed 2d, at 36, were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view every bit as much as did Chadwick's double-locked footlocker and Robbins' green, plastic wrapping. Faithful application of the warrant requirement does not require police to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Rather, it only requires them

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to adhere to norms of privacy that members of the public plainly acknowledge.

The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private

intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person . . . seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected." Katz, 389 US, at 351-352, 19 L Ed 2d 576, 88 S Ct 507. We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute. See Chapman v United States, 365 US 610, 616-617, 5 L Ed 2d 828, 81 S Ct 776 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes); Stoner v California, 376 US 483, 487-490, 11 L Ed 2d 856, 84 S Ct 889 (1964) (implicit consent to janitorial personnel to enter motel room does not amount to consent to police search of room); O'Connor v Ortega, 480 US 709, 717, 94 L Ed 2d 714, 107 S Ct 1492 (1987) (a government employee has a reasonable expectation of privacy in his office, even though "it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office"). As Justice Scalia aptly put it, the Fourth Amendment protects "privacy . . . not solitude." O'Connor, supra, at 730, 94 L Ed 2d 714, 107 S Ct 1492 (opinion concurring in judgment).

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, . . . who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." Ante, at 40, 100 L Ed 2d, at 37. In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance

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commanded him to do so, Orange County Code § 4-3-45(a) (1986) (must "remov[e] from the premises at least once each week" all "solid waste created, produced or accumulated in or about [his] dwelling house"), and prohibited him from disposing of it in any other way, see Orange County Code § 3-3-85 (1988) (burning trash is unlawful). Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings . . . by simply leaving them at home." O'Connor, supra, at 725, 94 L Ed 2d 714, 107 S Ct 1492. More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance. See Ex parte Jackson, 96 US 727, 24 L Ed 877 (1878); United States v Van Leeuwen, 397 US 249, 25 L Ed 2d 282, 90 S Ct 1029 (1970); United

States v Jacobsen, 466 US 109, 80 L Ed 2d 85, 104 S Ct 1652 (1984).[4]

III

In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the

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"sanctity of [the] home and the privacies of life," Boyd v United States, 116 US, at 630, 29 L Ed 746, 6 S Ct 524, and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. Ante, at 39, 100 L Ed 2d, at 36. The American society with which I am familiar "chooses to dwell in reasonable security and freedom from surveillance," Johnson v United States, 333 US 10, 14, 92 L Ed 436, 68 S Ct 367 (1948), and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

I dissent.

4. To be sure, statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail, see, e.g., 18 USC §§ 1701-1705, 1708 [18 USCS §§ 1701-1705, 1708], but the expectation of privacy in no way depends on statutory protection. In fact, none of the cases cited in the text even mention such statutes in finding Fourth Amendment protection in materials handed over to public or private carriers for delivery.

NEW YORK v CLASS

475 US 106, 89 L Ed 2d 81, 106 S Ct 960

[475 US 106]

NEW YORK, Petitioner

v

BENIGNO CLASS

475 US 106, 89 L Ed 2d 81, 106 S Ct 960

[No. 84-1181]

Argued November 4, 1985. Decided February 25, 1986.

Decision: Fourth Amendment held not violated by police officer's finding gun while reaching into car to move papers obscuring vehicle identification number, after stopping car for traffic violations.

SUMMARY

After observing a car which was speeding and which had a cracked windshield, both of which were traffic violations, police officers directed the driver to stop the car. While the driver left the car and provided one officer with a registration certificate and proof of insurance, but stated that he had no driver's license, the other officer opened the left door of the car and checked the door jamb for the vehicle identification number, and when the officer did not find the number on the door jamb, he reached into the car to move some papers, obscuring the area of the dashboard where the number was located, and in doing so, he saw the handle of a gun protruding from underneath the driver's seat. The officer seized the gun, and the driver was promptly arrested. After a motion to suppress the gun as evidence was denied, the driver was convicted, in the Supreme Court of Bronx County, New York, for illegal possession of a weapon. The Appellate Division of the Supreme Court, First Department, affirmed the conviction without opinion (97 App Div 2d 741, 468 NYS2d 892), but the New York Court of Appeals reversed, holding (1) that a police officer's nonconsensual entry into an individual's car to determine the vehicle identification number violates the Federal and New York Constitutions where it is based solely on a stop for a traffic infraction; (2) that the Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy; (3) that the area underneath the seat of a car is one which a person legitimately expects to remain private; and (4) that in the present case, the officer's intrusion into the car in an effort to learn the vehicle identification

SUBJECT OF ANNOTATION

Beginning on page 939, infra

Validity, under Federal Constitution, of warrantless search of motor vehicle

Briefs of Counsel, p 937, infra.

number was not justified by the traffic violations which had occurred, in the absence of reason to suspect that the car was stolen (63 NY2d 491, 483 NYS2d 181, 472 NE2d 1009).

On certiorari, the United States Supreme Court reversed and remanded the case. In an opinion by O'CONNOR, J., joined by BURGER, Ch. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., and joined in part (as to holding (1) below) by BRENNAN, MARSHALL, and STEVENS, JJ., it was held (1) that the New York Court of Appeals' decision did not rest on an independent state ground precluding the United States Supreme Court from having jurisdiction, and (2) that the officer's search in the present case was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the vehicle identification number and the fact that the officers had observed the driver commit two traffic violations.

POWELL, J., joined by BURGER, Ch. J., concurring, stated that because of the unique and important governmental interests served by inspection of the vehicle identification number, an officer making a lawful stop of a vehicle has the right and duty to inspect the vehicle identification number; that where the vehicle identification number is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the vehicle identification number; and that an officer's efforts to observe the vehicle identification number need not be subjected to the same scrutiny which courts properly apply when police have intruded into a vehicle to arrest or to search for evidence of crime.

BRENNAN, J., joined by MARSHALL and STEVENS, JJ., concurred in the court's holding as to jurisdiction, but dissented on the merits, on the grounds that the officer's search of the car was without probable cause and was therefore unconstitutional; that the fact that the government used the vehicle identification number as part of its scheme for regulating automobiles was insufficient to justify a search of a passenger compartment to retrieve such information; that in the absence of any reason for suspecting danger, the search of the car could not be justified on the grounds of officer safety; and that the traffic infractions which occurred in the present case did not give the police a reason to search for the vehicle identification number.

WHITE, J., joined by STEVENS, J., dissented on the grounds that the governmental interest in obtaining a vehicle identification number by entering an area protected by the Fourth Amendment was not sufficient to outweigh an owner's privacy interest in the interior of a car.

NEW YORK v CLASS
475 US 106, 89 L Ed 2d 81, 106 S Ct 960

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 10 — vehicle identification number — reaching into car

1a-1e. The Fourth Amendment is not violated where (1) a police officer, in order to observe a vehicle identification number generally visible from outside a car, reaches into the passenger compartment of the car to move papers obscuring the vehicle identification number after the driver of the car has been stopped for traffic violations and has exited the car, (2) the officer, while doing so, sees the handle of a gun protruding from underneath the driver's seat, (3) danger to the officer's safety would have been presented by returning the driver immediately to the car, and (4) the search stemmed from some probable cause focusing suspicion on the individual affected by the search; such a search is sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable

expectation of privacy in the vehicle identification number and the fact that police officers had observed the driver commit traffic violations. (Brennan, Marshall, Stevens, and White, JJ., dissented from this holding).

[See annotation p 939, infra]

Appeal § 487 — Supreme Court review — adequate state grounds

2. A state appellate court decision does not rest on adequate and independent state constitutional grounds, so as to preclude the United States Supreme Court from having jurisdiction on certiorari, where the state appellate court's opinion (1) mentions the state constitution only once, and only in direct conjunction with the Federal Constitution, and (2) makes use of both federal and state cases in its analysis, generally citing both for the same proposition; when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the United States Supreme Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Appeal § 500 — Supreme Court review — adequate state grounds

3. A state appellate court decision does not rest on adequate and independent state statutory grounds, so as to preclude the United States Supreme Court from having jurisdiction on certiorari, where (1) the state appellate court, while noting that a state statute provided no justification for a search, relied on the Federal Constitution, not the state statute, in determining that a search by a police officer was prohibited, and (2) it may be inferred that the state appellate court believed the statutory issue insufficient to resolve the case, since the state adhered to the general rule that when statutory construction can resolve a case, courts should not decide constitutional issues, and since the state appellate court discussed both statutory and constitutional grounds.

Search and Seizure §§ 5, 10 — automobiles — expectation of privacy

4. Although a citizen does not surrender all the protections of the Fourth Amendment by entering an automobile, a state's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a constitutionally protected reasonable expectation of privacy.

Search and Seizure § 10 — vehicle identification number

5. Because of the important role played by the vehicle identification number in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to insure that the vehicle identification number is placed in plain view, there is no reasonable expectation of privacy in the vehicle identification number, for purposes of the Fourth Amendment, even if papers in a car obscure the vehicle identification number from the plain view of the office of a police officer; the placement of obscuring papers is insufficient to create a privacy interest in the vehicle identification number, and a police officer's mere viewing of a vehicle identification number by

moving obscuring papers is not a violation of the Fourth Amendment.

Search and Seizure §§ 2, 10 — automobiles

6. While the interior of an automobile is not subject to the same expectations of privacy which exists with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police, and an intrusion into the space in the interior of a car constitutes a search, for purposes of the Fourth Amendment.

Search and Seizure § 25 — search without warrant

7. When a search or seizure has its immediate object a search for a weapon, the weighty interest in the safety of police officers justifies a warrantless search based only on a reasonable suspicion of criminal activity, and such a search is permissible despite its substantial intrusiveness.

Search and Seizure § 10 — vehicle identification number

8. Under the Fourth Amendment, a police officer is not authorized to enter a vehicle to obtain a dashboard-mounted vehicle identification number when the vehicle identification number is visible from outside the automobile; if the vehicle identification number is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it.

SYLLABUS BY REPORTER OF DECISIONS

When two New York City police officers observed respondent driving above the speed limit in a car with a cracked windshield, both traffic violations under New York law, they stopped him. He then emerged from the car and approached one of the officers. The other officer opened the car door to look for the Vehicle Identification Number (VIN), which is located on the left door jamb in pre-1969 automobiles. When the officer did not find the VIN on the door jamb, he reached into the car's interior to move some papers obscuring the area of the dashboard where the VIN is located on later-model automobiles. In doing so, the officer saw the handle of a gun protruding from underneath the driver's seat and seized the gun. Respondent was then arrested. After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon. The Appellate Division of the New York Supreme Court upheld the conviction, but the New York Court of Appeals reversed, holding that in the absence of any justification for the search of respondent's car besides the traffic violations, the search was prohibited and the gun must accordingly be excluded from evidence.

Held:

1. The New York Court of Appeals' decision did not rest on an adequate and independent state ground so as to deprive this Court of jurisdiction. The Court of Appeals' opinion, which mentions the New York Constitution only once and then in direct conjunction with the Federal Constitution and which makes use of both federal and New York cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. Moreover, in determining that the search in question was prohibited, the court looked

to the Federal Constitution and not to a state statute that authorizes officers to demand that drivers reveal their VIN, merely holding that that statute provided no justification for a search.

2. The police officer's action in searching respondent's car did not violate the Fourth Amendment.

(a) Because of the important role played by the VIN in the pervasive governmental regulation of automobiles and the efforts by the Federal Government through regulations to assure that the VIN is placed in plain view, respondent had no reasonable expectation of privacy in the VIN. The placement of the papers obscuring the VIN was insufficient to create a privacy interest in the VIN.

(b) The officer's search was sufficiently unintrusive to be constitutionally permissible in light of respondent's lack of a reasonable expectation of privacy in the VIN, the fact that the officers observed respondent commit two traffic violations, and concerns for the officers' safety.

63 NY2d 491, 472 NE2d 1009, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Burger, C.J., and Blackmun, Powell, and Rehnquist, JJ., joined, and in Part II of which Brennan, Marshall, and Stevens, JJ., joined. Powell, J., filed a concurring opinion, in which Burger, C.J., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined. White, J., filed a dissenting opinion, in which Stevens, J., joined.

APPEARANCES OF COUNSEL

Steven R. Kartagener argued the cause for petitioner.

Mark C. Cogan argued the cause for respondent, pro hac vice, by special leave of Court.

Briefs of Counsel, p 937, infra.

OPINION OF THE COURT

[475 US 107]

Justice **O'Connor** delivered the opinion of the Court.

[1a] In this case, we must decide whether, in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car. We hold that, in these circumstances, the police officer's action does not violate the Fourth Amendment.

I

On the afternoon of May 11, 1981, New York City police officers Lawrence Meyer and William McNamee observed respondent

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Benigno Class driving above the speed limit in a car with a cracked windshield. Both driving with a cracked windshield and speeding are traffic violations under New York law. See NY Veh & Traf Law §§ 375(22), 1180(d) (McKinney 1970). Respondent followed the officers' ensuing directive to pull over. Respondent then emerged from his car and approached Officer Meyer. Officer McNamee went directly to respondent's vehicle. Respondent provided Officer Meyer with a registration certificate and proof of insurance, but stated that he had no driver's license.

Meanwhile, Officer McNamee opened the door of respondent's car to look for the VIN, which is located on the left door jamb in automobiles manufactured before 1969. When the officer did not find the VIN on the door jamb, he reached into the interior of respondent's car to move some papers obscuring the area of the dashboard where the VIN is located in later-model automobiles. In doing so, Officer McNamee saw the handle of a gun protruding about one inch from underneath the driver's seat. The officer seized the gun, and respondent was promptly arrested. Respondent was also issued summonses for his traffic violations.

It is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations. Nor is it disputed that respondent committed the traffic violations with which he was charged, and that, as of the day of the arrest, he had not been issued a valid driver's license.

After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon in the third degree. See NY Penal Law § 265.02(4) (McKinney 1980). The Appellate Division of the New York Supreme Court upheld the conviction without opinion. 97 App Div 2d 741, 468 NYS2d 892 (1983). The New York Court of Appeals reversed. It reasoned that the police officer's "intrusion . . . was undertaken to obtain

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information and it exposed . . . hidden areas" of the car, and "therefore constituted a search." 63 NY2d 491, 495, 472 NE2d 1009, 1011 (1984). Although it recognized that a search for a VIN generally involves a minimal intrusion because of its limited potential locations, and agreed that there is a compelling law enforcement interest in positively identifying vehicles involved in accidents or automobile thefts, the court thought it decisive that the facts of this case "reveal no reason for the officer to suspect other criminal activity [besides the traffic infraction] or to act to protect his own safety." Id., at 495-496, 472 NE2d, at 1012. The state statutory provision that authorizes officers to demand that drivers reveal their VIN "provided no justification for the officer's entry of [respondent's] car." Id., at 497, 472 NE2d, at 1013. If the officer had taken advantage of that statute and asked to see the VIN, respondent could have moved the papers away himself and no intrusion would have occurred. In the absence of any justification for the search besides the traffic infraction, the New York Court of Appeals ruled that the gun must be excluded from evidence.

We granted certiorari, 471 US 1003, 85 L Ed 2d 157, 105 S Ct 1863 (1985), and now reverse.

II

Respondent asserts that this Court is without jurisdiction to hear this case because the decision of the New York Court of Appeals rests on an adequate and independent state ground. We disagree.

[2] The opinion of the New York Court of Appeals mentions the New York Constitution but once, and then only in direct conjunction with the United States Constitution. 63 NY2d, at 493, 472 NE2d, at 1010. Cf. Michigan v Long, 463 US 1032, 1043, 77 L Ed 2d 1201, 103 S Ct 3469 (1983). The opinion below makes use

of both federal and New York cases in its analysis, generally citing both for the same proposition. See, e.g., 63 NY2d, at 494, 495, 472 NE2d, at 1011. The opinion lacks the requisite "plain statement" that it rests on state grounds.

[475 US 110]

Michigan v Long, supra, at 1042, 1044, 77 L Ed 2d 1201, 103 S Ct 3469. Accordingly, our holding in Michigan v Long is directly applicable here:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 US, at 1040-1041, 77 L Ed 2d 1201, 103 S Ct 3469.

See also California v Carney, 471 US 386, 389, n 1, 85 L Ed 2d 406, 105 S Ct 2066 (1985).

[3] Respondent's claim that the opinion below rested on independent and adequate state *statutory* grounds is also without merit. The New York Court of Appeals did not hold that § 401 of New York's Vehicle and Traffic Law prohibited the search at issue here, but, in rejecting an assertion of petitioner, merely held that § 401 "provided no *justification*" for a search. 63 NY2d, at 497, 472 NE2d, at 1013 (emphasis added). In determining that the police officer's action was prohibited, the court below looked to the Federal Constitution, not the State's statute. Moreover, New York adheres to the general rule that, when statutory construction can resolve a case, courts should not decide constitutional issues. See Ashwander v TVA, 297 US 288, 346-347, 80 L Ed 688, 56 S Ct 466 (1936) (Brandeis, J., concurring); In re Peters v New York City Housing Authority, 307 NY 519, 527, 121 NE2d 529, 531 (1954). Since the New York Court of Appeals discussed both statutory and constitutional grounds, we may infer that the court believed the statutory issue insufficient to resolve the case. The discussion of the statute therefore could not have constituted an independent and adequate state ground.

[475 US 111]

III

A

The officer here, after observing respondent commit two traffic violations and exit the car, attempted to determine the VIN of respondent's automobile. In reaching to remove papers obscuring the VIN, the officer intruded into the passenger compartment of the vehicle.

The VIN consists of more than a dozen digits, unique to each vehicle and required on all cars and trucks. See 49 CFR § 571.115 (1984). The VIN is roughly analogous to a serial number, but it can be deciphered to reveal not only the place of the automobile in the manufacturer's production run, but the make, model, engine type, and place of manufacture of the vehicle. See § 565.4.

The VIN is a significant thread in the web of regulation of the automobile. See generally 43 Fed Reg 2189 (1978). The ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways. For the Federal Government, the VIN improves the efficacy of recall cam-

paigns, and assists researchers in determining the risks of driving various makes and models of automobiles. In combination with state insurance laws, the VIN reduces the number of those injured in accidents who go uncompensated for lack of insurance. In conjunction with the State's registration requirements and safety inspections, the VIN helps to ensure that automobile operators are driving safe vehicles. By making automobile theft more difficult, the VIN safeguards not only property but also life and limb. See 33 Fed Reg 10207 (1968) (noting that stolen vehicles are disproportionately likely to be involved in automobile accidents).

To facilitate the VIN's usefulness for these laudable governmental purposes, federal law requires that the VIN be placed in the plain view of someone *outside* the automobile:

[475 US 112]

"The VIN for passenger cars [manufactured after 1969] shall be located inside the passenger compartment. It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting conditions by an observer having 20/20 vision (Snellen) whose eye point is located *outside the vehicle* adjacent to the left windshield pillar. Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm." 49 CFR § 571.115 (S4.6) (1984) (emphasis added).

In Delaware v Prouse, 440 US 648, 658, 59 L Ed 2d 660, 99 S Ct 1391 (1979), we recognized the "vital interest" in highway safety and the various programs that contribute to that interest. In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment.

B

[4] A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile. See Delaware v Prouse, supra, at 663, 59 L Ed 2d 660, 99 S Ct 1391; Almeida-Sanchez v United States, 413 US 266, 269, 37 L Ed 2d 596, 93 S Ct 2535 (1973). Nonetheless, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." Katz v United States, 389 US 347, 360, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Harlan, J., concurring). See Oliver v United States, 466 US 170, 177-180, 80 L Ed 2d 214, 104 S Ct 1735 (1984); Maryland v Macon, 472 US 463, 469, 86 L Ed 2d 370, 105 S Ct 2778 (1985).

The Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom

[475 US 113]

serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v Lewis, 417 US 583, 590, 41 L Ed 2d 325, 94 S Ct 2464, 69 Ohio Ops 2d 69 (1974) (plurality opinion).

Moreover, automobiles are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy:

> "Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." South Dakota v Opperman, 428 US 364, 368, 49 L Ed 2d 1000, 96 S Ct 3092 (1976).

See also Cady v Dombrowski, 413 US 433, 441-442, 37 L Ed 2d 706, 93 S Ct 2523 (1973); California v Carney, 471 US, at 392, 85 L Ed 2d 406, 105 S Ct 2066.

[5] The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable a fortiori to the VIN. As we have discussed above, the VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation. See Delaware v Prouse, supra, at 659, 59 L Ed 2d 660, 99 S Ct 1391 ("The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. *Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained*")

[475 US 114]

(emphasis added). In addition, it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search." See Cardwell v Lewis, supra, at 588-589, 41 L Ed 2d 325, 94 S Ct 2464, 69 Ohio Ops 2d 69. In sum, because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN.

We think it makes no difference that the papers in respondent's car obscured the VIN from the plain view of the officer. We have recently emphasized that efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist. See Oliver v United States, supra, at 182-184 L Ed 2d 214, 104 S Ct 1735 (placement of "No Trespassing" signs on secluded property does not create "legitimate privacy interest" in marihuana fields). Here, where the object at issue is an identification number behind the transparent windshield of an automobile driven

upon the public roads, we believe that the placement of the obscuring papers was insufficient to create a privacy interest in the VIN. The mere viewing of the formerly obscured VIN was not, therefore, a violation of the Fourth Amendment.

C

[6] The evidence that respondent sought to have suppressed was not the VIN, however, but a gun, the handle of which the officer saw from the interior of the car while reaching for the papers that covered the VIN. While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection

[475 US 115]

from unreasonable intrusions by the police. We agree with the New York Court of Appeals that the intrusion into that space constituted a "search." 63 NY2d, at 495, 472 NE2d, at 1011. Cf. Delaware v Prouse, 440 US, at 653, 59 L Ed 2d 660, 99 S Ct 1391 ("stopping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief"). We must decide, therefore, whether this search was constitutionally permissible.

[1b] If respondent had remained in the car, the police would have been justified in asking him to move the papers obscuring the VIN. New York law authorizes a demand by officers to see the VIN, see 63 NY2d, at 496-497, 472 NE2d, at 1012-1013, and even if the state law were not explicit on this point, we have no difficulty in concluding that a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop. See Prouse, supra, at 659, 59 L Ed 2d 660, 99 S Ct 1391. If respondent had stayed in his vehicle and acceded to such a request from the officer, the officer would not have needed to intrude into the passenger compartment. Respondent chose, however, to exit the vehicle without removing the papers that covered the VIN; the officer chose to conduct his search without asking respondent to return to the car. We must therefore decide whether the officer acted within the bounds of the Fourth Amendment in conducting the search. We hold that he did.

Keeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice. See D. Schultz & D. Hunt, Traffic Investigation and Enforcement 17 (1983). Nonetheless, out of a concern for the safety of the police, the Court has held that officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon. Pennsylvania v Mimms, 434

[475 US 116]

US 106, 108-111, 54 L Ed 2d 331, 98 S Ct 330 (1977) (per curiam). While we impute to respondent no propensity for violence, and while we are conscious of the fact that respondent here voluntarily left the vehicle, the facts of this case may be used to illustrate one of the principal justifications for the discretion given police officers by Pennsylvania v Mimms: while in the driver's seat, respondent had a loaded pistol at hand. Mimms allows an officer to guard against that possibility by requiring the driver to

exit the car briefly. Clearly, Mimms also allowed the officers here to detain respondent briefly outside the car that he voluntarily exited while they completed their investigation.

[1c] The question remains, however, as to whether the officers could not only effect the seizure of respondent necessary to detain him briefly outside the vehicle, but also effect a search for the VIN that may have been necessary only because of that detention. The pistol beneath the seat did not, of course, disappear when respondent closed the car door behind him. To have returned respondent immediately to the automobile would have placed the officers in the same situation that the holding in Mimms allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. See Pennsylvania v Mimms, supra, at 110, 54 L Ed 2d 331, 98 S Ct 330. In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment.

[7] The Fourth Amendment by its terms prohibits "unreasonable" searches and seizures. We have noted:

> "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' Camara v Municipal Court, 387 US 523, 534-535, 536-537, 18 L Ed 2d 9 the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with
>
> [475 US 117]
>
> rational inferences from those facts, justifiably warrant that intrusion." Terry v Ohio, 392 US 1, 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968) (footnote omitted) (brackets as in Terry).

This test generally means that searches must be conducted pursuant to a warrant backed by probable cause. See United States v Ventresca, 380 US 102, 105-109, 13 L Ed 2d 684, 85 S Ct 741 (1965); United States v Karo, 468 US 705, 714-715, 82 L Ed 2d 530, 104 S Ct 3296 (1984). When a search or seizure has as its immediate object a search for a weapon, however, we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity. See Terry v Ohio, supra; Adams v Williams, 407 US 143, 32 L Ed 2d 612, 92 S Ct 1921 (1972). Such searches are permissible despite their substantial intrusiveness. See Terry v Ohio, supra, at 24-25, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (search was "a severe, though brief, intrusion upon cherished personal security, and . . . must surely [have] b[een] an annoying, frightening, and perhaps humiliating experience").

[1d] When the officer's safety is less directly served by the detention, something more than objectively justifiable suspicion is necessary to justify the intrusion if the balance is to tip in favor of the legality of the governmental intrusion. In Pennsylvania v Mimms, supra, at 107, 54 L Ed 2d 331, 98 S Ct 330, the officers had personally observed the seized

individual in the commission of a traffic offense before requesting that he exit his vehicle. In Michigan v Summers, 452 US 692, 693, 69 L Ed 2d 340, 101 S Ct 2587 (1981), the officers had obtained a warrant to search the house that the person seized was leaving when they came upon him. While the facts in Pennsylvania v Mimms and Michigan v Summers differ in some respects from the facts of this case, the similarities are strong enough that the balancing of governmental interests against governmental intrusion undertaken in those cases is also appropriate here. All three of the factors involved in Mimms and Summers are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed

[475 US 118]

from some probable cause focusing suspicion on the individual affected by the search. Indeed, here the officer's probable cause stemmed from directly observing respondent commit a violation of the law.

[1e] When we undertake the necessary balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," United States v Place, 462 US 696, 703, 77 L Ed 2d 110, 103 S Ct 2637 (1983), the conclusion that the search here was permissible follows. As we recognized in Delaware v Prouse, 440 US, at 658, 59 L Ed 2d 660, 99 S Ct 1391, the governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officer's safety. The "critical" issue of the intrusiveness of the government's action, United States v Place, supra, at 722, 77 L Ed 2d 110, 103 S Ct 2637 (Blackmun, J., concurring in judgment), also here weighs in favor of allowing the search. The search was focused in its objective and no more intrusive than necessary to fulfill that objective. The search was far less intrusive than a formal arrest, which would have been permissible for a traffic offense under New York law, see NY Veh & Traf Law § 155 (McKinney Supp 1986); NY Crim Proc Law § 140.10(1) (McKinney 1981), and little more intrusive than a demand that the respondent—under the eyes of the officers—move the papers himself. The VIN, which was the clear initial objective of the officer, is by law present in one of two locations—either inside the door jamb, or atop the dashboard and thus ordinarily in plain view of someone outside the automobile. Neither of those locations is subject to a reasonable expectation of privacy. The officer here checked both those locations, and only those two locations. The officer did not root about the interior of the respondent's automobile before proceeding to examine the VIN. He did not reach into any compartments or open any containers. He did not even intrude into the interior at all until after he had checked the door jamb for

[475 US 119]

the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to move the offending papers. We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to

potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

[8] We note that our holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile. If the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it.*

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

[475 US 120]

Justice **Powell**, with whom The **Chief Justice** joins, concurring.

I join the Court's opinion but write to emphasize that, because of the unique and important governmental interests served by inspection of the Vehicle Identification Number (VIN), an officer making a lawful stop of a vehicle has the right and duty to inspect the VIN. Where the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN.

As the Court explains, the VIN essentially is a serial number that, by identifying certain features of the vehicle to which it is affixed, provides an effective and reliable means for positive identification of the vehicle. The VIN occupies a central position in the elaborate federal and state regulation of automobiles, which frequently depends on such positive identification. Federal regulations now direct manufacturers to place the VIN in a location where it is in the plain view of an observer standing outside the vehicle. 49 CFR § 571.115 (S4.6) (1984).

The Court has answered correctly the question presented in this case by applying conventional Fourth Amendment analysis. I believe, however, that an officer's efforts to observe the VIN need not be subjected to the same scrutiny that courts properly apply when police have intruded into a vehicle to arrest or to

* Petitioner invites us to hold that respondent's status as an unlicensed driver deprived him of any reasonable expectations of privacy in the vehicle, because the officers would have been within their discretion to have prohibited respondent from driving the car away, to have impounded the car, and to have later conducted an inventory search thereof. Cf. South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092 (1976) (police may conduct inventory search of car impounded for multiple parking violations); Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984) (discussing the "inevitable discovery" exception to the exclusionary rule). Petitioner also argues that there can be no Fourth Amendment violation here because the police could have arrested respondent, see NY Veh & Traf Law § 155 (McKinney Supp 1986); NY Crim Proc Law § 140.10(1) (McKinney 1981), and could then have searched the passenger compartment at the time of arrest, cf. New York v Belton, 453 US 454, 69 L Ed 2d 768, 101 S Ct 2860 (1981), or arrested respondent and searched the car after impounding it pursuant to the arrest, see Cady v Dombrowski, 413 US 433, 37 L Ed 2d 706, 93 S Ct 2523 (1973). We do not, however, reach those questions here.

search for evidence of crime. When an officer lawfully has stopped a motor vehicle for a traffic infraction, the officer is entitled to inspect license and registration documents. See Delaware v Prouse, 440 US 648, 59 L Ed 2d 660, 99 S Ct 1391 (1979); Pennsylvania v Mimms, 434 US 106, 54 L Ed 2d 331, 98 S Ct 330 (1977) (per curiam). Unquestionably, the officer also may look through the windshield, observe the VIN, and record it without implicating any Fourth Amendment concerns. Respondent does not contend, nor could it reasonably be contended, that such action violates the Federal Constitution. The question raised on the facts of this case, therefore, is whether the

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Fourth Amendment was offended by the incremental intrusion resulting from the officer's efforts to observe this VIN once respondent's vehicle lawfully was stopped. Cf. Pennsylvania v Mimms, supra, at 109, 54 L Ed 2d 331, 98 S Ct 330.

The problem for the officer was that the VIN, located on the dashboard just behind the windshield, was obscured by papers. The sequence of events that transpired is well-stated in the Court's opinion. Suffice it to say here that, when respondent left his vehicle to talk to one of the officers, the other officer sought to determine the VIN of the automobile. This officer did what his duty required. Because he could not see the VIN from outside the car, and because the driver had exited the vehicle, the officer entered the car to the extent necessary to move the papers covering the VIN. It was only then that he observed a handgun protruding from beneath the front seat. The Court of Appeals of New York held that this intrusion was an unlawful search. While agreeing that a search occurred, this Court today sustains the officer's action on reasoning familiar in cases applying Fourth Amendment principles to automobiles.

In my view, the Fourth Amendment question may be stated simply as whether the officer's efforts to inspect the VIN were reasonable. There is no finding in this case that the officer's entry into respondent's vehicle—opening the door and reaching his hand to the dashboard—was not reasonably necessary to achieve his lawful purpose. If respondent had remained in his seat, as the Court observes, the officer properly should have requested him to remove the papers obstructing the VIN. In the absence of compliance with such a request, an arrest would have been lawful. Cf. People v Ellis, 62 NY2d 393, 465 NE2d 826 (1984) (on lawful traffic stop, officers properly arrested driver for failure to produce license or other identification).

In view of the important public purposes served by the VIN system and the minimal expectation of privacy in the VIN, I would hold that where a police officer lawfully stops a

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motor vehicle, he may inspect the VIN, and remove any obstruction preventing such inspection, where the driver of the vehicle either is unwilling or unable to cooperate.*

Justice **Brennan,** with whom Jus-

* I do not suggest, of course, that the Fourth Amendment is inapplicable in this context. An officer may not use VIN inspection as a pretext for searching a vehicle for contraband or weapons. Nor may the officer undertake an entry more extensive than reasonably necessary to remove any obstruction and read the VIN.

tice **Marshall** and Justice **Stevens** join, concurring in part and dissenting in part.

I agree that the decision of the New York Court of Appeals does not rest on an adequate and independent state ground, see Michigan v Long, 463 US 1032, 1043, 77 L Ed 2d 1201, 103 S Ct 3469 (1983), and therefore join Part II of the Court's opinion. I also agree that the police conducted a *search* of respondent's vehicle to inspect the Vehicle Identification Number (VIN). Ante, at 114-115, 89 L Ed 2d, at 91. However, I disagree that this *search* was constitutionally permissible, and to that extent respectfully dissent.

I

The facts bear repetition. Officers Meyer and McNamee pulled respondent over after observing him commit minor traffic violations. Respondent emerged from his car, closed the door, and joined Officer Meyer at the rear of the vehicle. Respondent gave Officer Meyer his car registration certificate and proof of insurance, but did not have a driver's license. Meanwhile, without first examining the documents, and unaware that respondent had no driver's license, Officer McNamee opened the door of the car to look for the VIN on the door jamb and, not finding it there, reached inside to remove papers obstructing his view of the VIN on the dashboard. While doing so, McNamee saw a gun handle protruding from underneath the driver's seat. Respondent was arrested, and eventually convicted, for criminal possession

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of a weapon. He was issued summonses for his traffic violations.

McNamee conducted the search even though "[i]t is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations." Ante, at 108, 89 L Ed 2d, at 87.

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer." California v Carney, 471 US 386, 390, 85 L Ed 2d 406, 105 S Ct 2066 (1985). While we have found no Fourth Amendment violation in certain warrantless police searches of cars, see, e.g., Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), this narrow exception "applies only to searches of vehicles that are supported by probable cause." United States v Ross, 456 US 798, 809, 72 L Ed 2d 572, 102 S Ct 2157 (1982).

Officer McNamee's *search* of respondent's car was clearly without probable cause and was therefore patently unconstitutional. The Court's contrary holding rests not on any reasoning or logic grounded in Fourth Amendment jurisprudence, but rather on a strained and irrelevant analysis. To substitute for the absence of probable cause, the Court struggles to balance "the governmental interest in highway safety served by obtaining the VIN" and a "concern for the officer's safety" against the "nature and quality" of the intrusion that took place. Ante,

at 118, 89 L Ed 2d, at 93. Once again, the Court "takes a long step . . . toward 'balancing' into oblivion the protections the Fourth Amendment affords." Michigan v Long, supra, at 1065, 77 L Ed 2d 1201, 103 S Ct 3469 (Brennan, J., dissenting). The police had no justification whatever, let alone probable cause, to *search* for for the

[475 US 124]

VIN, and therefore no amount of "balancing" can make the *search* of respondent's car constitutional.

A

The Court says much about the "important role played by the VIN in the pervasive governmental regulation of the automobile," and holds that respondent had no "reasonable expectation of privacy in the VIN." Ante, at 114, 89 L Ed 2d, at 90. This aspect of the Court's analysis is particularly baffling. Of course, the VIN plays a significant part in federal and state schemes for regulating automobiles, and federal regulations require vehicle manufacturers to install VINs that may be read from outside the passenger compartment. See 49 CFR § 571.115 (S4.6) (1984). However, even assuming that respondent had no reasonable expectation of privacy in the VIN, why is this relevant to the question we decide? Officer McNamee did not look for the VIN from outside of respondent's vehicle, but *searched* the car without respondent's consent in order to locate the VIN. By focusing on the object of the search—the VIN—the Court misses the issue we must decide: whether an interior *search* of the car to discover that object was constitutional. Regardless of whether he had a reasonable expectation of privacy in the VIN, respondent clearly retained a reasonable expectation of privacy with respect to the area searched by the police—the car's interior. As the court below noted, "[t]he fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it." 63 NY2d 491, 495, 472 NE2d 1009, 1011 (1984); cf. id., at 496-497, 472 NE2d, at 1012-1013 (noting that state law only requires drivers to furnish police with vehicle identification).

B

Because vehicles are mobile and subject to pervasive government regulation, an individual's justifiable expectation of privacy in a vehicle is less than in his home. California v

[475 US 125]

Carney, supra. This is why the Court has held that warrantless searches of cars may sometimes not violate the Fourth Amendment, but only if the searches are supported by probable cause. See, e.g., Carroll v United States, supra; United States v Ross, supra. For "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." Delaware v Prouse, 440 US 648, 662, 59 L Ed 2d 660, 99 S Ct 1391 (1979); see also Almeida-Sanchez v United States, 413 US 266, 269, 37 L Ed 2d 596, 93 S Ct 2535 (1973) ("[T]he Carroll doctrine does not declare a field day for the police in searching automobiles"). Because the Fourth Amendment constrains the State's authority to *search* automobiles under the guise of "regulation," the fact that the Government uses the VIN as part of its scheme for regulating automobiles is insufficient to justify a *search* of the passenger compart-

ment to retrieve such information. Rather, as is ordinarily the case with any car search, a VIN search must be supported by probable cause. See Almeida-Sanchez v United States, supra, at 269, 37 L Ed 2d 596, 93 S Ct 2535 ("Automobile or no automobile, there must be probable cause for The search"). "[T]o eliminate any requirement that an officer be able to explain the reasons for his actions . . . leaves police discretion utterly without limits." Pennsylvania v Mimms, 434 US 106, 122, 54 L Ed 2d 331, 98 S Ct 330 (1977) (Stevens, J., dissenting). In this case, the police clearly lacked probable cause to search for the VIN.

The Court suggests that respondent's traffic infractions provided the requisite probable cause, this on the ground that there was "probable cause focusing suspicion on the individual affected by the search." Ante, at 118, 89 L Ed 2d, at 93. This analysis makes a mockery of the Fourth Amendment. There can be no question that respondent's traffic offenses gave the police probable cause to stop the car and to demand some form of vehicle identification. Delaware v Prouse, supra, at 663, 59 L Ed 2d 660, 99 S Ct 1391. Too, this sort of routine traffic stop generally gives police an *opportunity* to inspect the VIN through the car windshield.

[475 US 126]

But Fourth Amendment protections evaporate if this supplies the requisite probable cause to *search* for a VIN not visible from the exterior of the car. Plainly the search of the interior for the VIN was unnecessary since respondent had supplied his car registration certificate, and there is no suggestion that it was inadequate.[1]

C

The Court supplies not an iota of reasoning to support the holding that respondent's traffic infractions gave the police probable cause to search for the VIN. The Court is content simply to conclude that "the governmental interest in highway safety served by obtaining the VIN is of the first order." Ante, at 118, 89 L Ed 2d, at 93. Although I agree that the government has a strong interest in promoting highway safety, see Delaware v Prouse, supra, at 658, 59 L Ed 2d 660, 99 S Ct 1391, I fail to see just how the VIN search conducted here advanced that interest. Despite the Court's lengthy exposition on the variety of safety-related purposes served by the VIN,[2] respondent's car was not searched to further any of the identified interests. If the officers intended to identify what they considered to be an "unsafe" vehicle, that could have been done without searching respon-

1. Indeed, the facts of this case belie any suggestion that the VIN search was needed positively to identify respondent's vehicle. Officer McNamee did not wait to see respondent's vehicle registration certificate before he started to search respondent's car, and did not record the VIN he found in order to compare it with other identifying documents.

2. The Court notes that "[t]he ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways." Ante, at 111, 89 L Ed 2d, at 88. As examples, the Court explains that "the VIN improves the efficacy of recall campaigns," "assists researchers in determining the risks of driving various makes and models of automobiles," helps to "reduc[e] the number of those injured in accidents who go uncompensated for lack of insurance," ensures "that automobile operators are driving safe vehicles," and "[b]y making automobile theft more difficult . . . safeguards not only property but also life and limb." Ibid.

dent's car. Thus, the mere fact that the State utilizes the VIN in conjunction with regulations designed to promote

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highway safety does not give the police a reason to *search* for such information every time a motorist violates a traffic law.[3] Absent some reason to search for the VIN, the government's admittedly strong interest in promoting highway safety cannot validate the intrusion resulting from the *search* of respondent's vehicle.

III

The Court, relying on Pennsylvania v Mimms, supra, and Michigan v Summers, 452 US 692, 69 L Ed 2d 340, 101 S Ct 2587 (1981), next attempts to support its holding on the ground that "[i]n light of the danger to the officers' safety [that would be] presented by returning respondent immediately to his car [to uncover the VIN,] the search to obtain the VIN was not prohibited by the Fourth Amendment." Ante, at 116, 89 L Ed 2d, at 92. Neither cited decision supports this argument.

In Summers, police detained the occupant of a home being searched pursuant to a valid warrant. The Court held that this seizure was constitutional because it served several important law enforcement interests, including officer safety, and because the search warrant provided a reasonable basis for the police to determine that the occupant was engaged in criminal activity and should therefore be detained. 452 US, at 702-704, 69 L Ed 2d 340, 101 S Ct 2587. By contrast, here there was no reason for the officers to search the car to inspect the VIN. The officers knew only that respondent had committed minor traffic violations, and while this may have given them an *opportunity* to inspect the VIN, it did not provide a reason to *search* the interior of the car for it.

In Mimms, police stopped an automobile for a traffic infraction, and ordered the driver to step outside the vehicle. As the driver emerged, the officers noticed a large bulge

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under his jacket, and after frisking him, discovered a loaded revolver. The Court held that because such actions protected officer safety, the police could legitimately order a driver out of his car when they made a lawful traffic stop. Unlike the situation in Mimms, the intrusion in this case—the search of respondent's vehicle—did not directly serve officer safety. Nevertheless, the Court finds that "[t]o have returned respondent immediately to the automobile [to clear the papers on the dashboard obscuring the VIN] would have placed the officers in the same situation that the holding in Mimms allows officers to avoid." Ante, at 116, 89 L Ed 2d, at 92. Again, the Court forgets that the police, with *no reason* to search the interior, had *no reason* to return respondent to his car. Thus, the State's interest in protecting officer safety cannot validate the search.

Of course, if the officers had reasonable grounds to suspect that the traffic stop presented a threat to their safety, they would have been authorized to search respondent's ve-

3. By analogy, had respondent emerged from his car without his vehicle registration certificate or driver's license, I do not read the Court's opinion to hold that the police could have searched the passenger compartment in order to locate these documents, even though they also play important roles in the State's regulation of automobiles.

hicle for weapons. See Michigan v Long, 463 US, at 1051, 77 L Ed 2d 1201, 103 S Ct 3469. However, neither officer ever suggested that the situation posed any danger, and the court below specifically found that the facts "reveal no reason for the officer[s] . . . to act to protect [their] own safety." 63 NY2d, at 496, 472 NE2d, at 1012. In the absence of even the slightest suspicion of danger, the search of respondent's car cannot be justified on grounds of officer safety.

IV

Finally, the Court finds that "[t]he 'critical' issue of the intrusiveness of the Government's action . . . also here weighs in favor of allowing the search." Ante, at 118, 89 L Ed 2d, at 93. The Court's effort to minimize the extent of the intrusion, see ante, at 118-119, 89 L Ed 2d, at 93, won't wash. Officer McNamee clearly *searched* respondent's car by opening the door and reaching into the passenger compartment to remove papers from the dashboard. Even if he did not engage in a full-scale excavation, this *search* exposed areas of the passenger compartment not visible

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from outside the vehicle. "The narrow intrusions involved in [Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." Dunaway v New York, 442 US 200, 212, 60 L Ed 2d 824, 99 S Ct 2248 (1979). That the search conducted here was substantially more intrusive than an ordinary traffic stop starkly exposes the impropriety of the Court's strained effort to sanction McNamee's patently illegal search by the balancing approach. In United States v Place, 462 US 696, 721, 77 L Ed 2d 110, 103 S Ct 2637 (1983), Justice Blackmun too noted his concern over the "emerging tendency on the part of the Court to convert the Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable." Cf. 462 US, at 718, 77 L Ed 2d 110, 103 S Ct 2637 (Brennan, J., concurring in result); Kolender v Lawson, 461 US 352, 363, 75 L Ed 2d 903, 103 S Ct 1855 (1983) (Brennan, J., concurring); Florida v Royer, 460 US 491, 509, 75 L Ed 2d 229, 103 S Ct 1319 (1983) (Brennan, J., concurring in result).[4]

In any event, even if there had been only a limited search here that justified the Court in balancing the extent of the intrusion against the importance of the governmental interests allegedly served, this alone cannot legalize the *search* of respondent's car. In situations where the Court has approved of very limited intrusions on less than probable

4. "There are important reasons why balancing inquiries should not be conducted except in the most limited circumstances." United States v Place, 462 US, at 718, 77 L Ed 2d 110, 103 S Ct 2637 (Brennan, J., concurring in result). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." Dunaway v New York, 442 US 200, 213, 60 L Ed 2d 824, 99 S Ct 2248 (1979). As a general rule, "the Framers of the [Fourth] Amendment balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause." United States v Place, supra, at 722, 77 L Ed 2d 110, 103 S Ct 2637 (Blackmun, J., concurring in judgment).

cause, the Court has always required that "the police officer . . . be

[475 US 130]

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v Ohio, 392 US 1, 21, 20 L Ed 2d 889, 88 S Ct 1868 (1968); see Michigan v Long, supra, at 1049, 77 L Ed 2d 1201, 103 S Ct 3469 (police must have reasonable belief that suspect is dangerous and may gain immediate control of weapons to search areas of passenger compartment where weapons may be placed or hidden); Delaware v Prouse, 440 US, at 663, 59 L Ed 2d 660, 99 S Ct 1391 (police must have reasonable suspicion that motorist is unlicensed, that car is unregistered, or that either the vehicle or an occupant is otherwise subject to seizure, to stop automobile and detain driver); United States v Brignoni-Ponce, 422 US 873, 881-882, 45 L Ed 2d 607, 95 S Ct 2574 (1975) (police must have reasonable suspicion that vehicle contains illegal aliens in order to stop the car and question occupants about citizenship). In this case, respondent's traffic infractions did not give the police a reason to search for the VIN, and the police offered no other justification that would reasonably warrant such an intrusion.

In sum, the Court's decision today is still another of its steps on the road to evisceration of the protections of the Fourth Amendment. The Court's willingness to sanction a car search that the police had no probable cause to conduct highlights this trend. However, I find the Court's holding particularly disturbing because none of the factors the Court relies upon—the lack of reasonable expectation of privacy in the VIN, the officers' observing respondent commit minor traffic violations, the government's interest both in promoting highway safety and in shielding officers from danger, and the allegedly limited nature of the search that took place—gave the police *any reason* to search for the VIN. The Court once again disregards the admonition of Justice Jackson:

> "[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the
>
> [475 US 131]
>
> individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." Brinegar v United States, 338 US 160, 180, 93 L Ed 1879, 69 S Ct 1302 (1949) (dissenting opinion).[5]

Justice **White,** with whom Justice **Stevens,** joins, dissenting.

The police officer involved in this case entered the interior of respondent's automobile, an area protected by the Fourth Amendment against unreasonable searches and seizures. A car may be searched without a warrant if there is probable cause to do so, but no one suggests that this

5. Justice Powell, in a concurring opinion joined by The Chief Justice, would find that "[w]here the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN." Ante, at 120, 89 L Ed 2d, at 94. Even were I to agree with this standard, in this case Officer McNamee searched respondent's car without ever asking him voluntarily to disclose the VIN's location.

precondition for a search existed here. The entry was solely to remove an obstruction that prevented the VIN from being seen from outside the car. The issue is whether the governmental interest in obtaining the VIN by entering a protected area is sufficient to outweigh the owner's privacy interest in the interior of the car. I am unprepared, at least for the reasons the Court gives, to conclude that it is.

Had Class remained in his car and refused an officer's order (1) to turn over his registration certificate and (2) to remove the article obscuring the VIN, there would have been no more justification for entering the interior of the car and doing what was necessary to read the VIN than there would have been to enter and search for the registration certificate in the glove compartment. It may be that under our cases, Class could have been sanctioned for his refusal in such a case, but we have never held that his refusal would permit a search of the glove compartment. Even if it did, it would be different if there was no refusal at all, but just an entry to

[475 US 132]

find a registration certificate. If that is the case, this one is no different in kind: there was no refusal and nothing but a nonconsensual entry to search without probable cause and without emergent circumstances.

It makes no difference that the law requires the VIN to be visible from outside the car. Otherwise, a requirement that the VIN be carried in a prominent location in the trunk of the car would justify searches of that area whenever there was a stop for a traffic violation. I thus do not join the Court's opinion, which in effect holds that a search of a car for the VIN is permissible whenever there is a legal stop, whether or not the driver is even asked to consent.

Nevertheless, Class was unlicensed and the police were not constitutionally required merely to give him a citation and let his unlicensed driving continue. Arguably, one of the officers legally could have driven the car away himself and in the process noticed the gun; the car could have been towed and inspected at the station; or Class could have been arrested for driving without a license and the entire car searched. But the Court eschews these possible alternative rationales and rests its judgment on grounds that I do not accept.

EDITOR'S NOTE

An annotation on "Validity, under Federal Constitution, of warrantless search of motor vehicle," appears p 939, infra.

*[389 US 347]

*CHARLES KATZ, Petitioner,

v

UNITED STATES

389 US 347, 19 L Ed 2d 576, 88 S Ct 507

[No. 35]

Argued October 17, 1967. Decided December 18, 1967.

SUMMARY

Defendant was convicted in the United States District Court for the Southern District of California of transmitting wagering information by telephone. At trial the government was permitted, over the defendant's objection, to introduce evidence of his end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. The Court of Appeals for the Ninth Circuit affirmed. (369 F2d 130.)

On certiorari, the Supreme Court of the United States reversed. In an opinion by STEWART, J., expressing the views of seven members of the court, it was held that antecedent judicial authorization, not given in the instant case, was a constitutional precondition of the kind of electronic surveillance involved.

DOUGLAS, J., with the concurrence of BRENNAN, J., joined the court's opinion, rejecting, however, the view expressed by WHITE, J., in his concurring opinion, that no antecedent judicial authorization is necessary for electronic surveillance if the President of the United States or the Attorney General has authorized electronic surveillance as required by national security.

HARLAN, J., also concurred, joining in and elaborating on the opinion of the court.

WHITE, J., also joined the opinion of the court.

BLACK, J., dissented on the ground that eavesdropping carried on by electronic means does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment.

MARSHALL, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Witnesses § 84 — self-incrimination — immunity

1. While pursuant to the grant, in 47 USC § 409(*l*), of immunity to one compelled, after claiming his privilege against self-incrimination, to testify before the Federal Communications Commission, his testimony cannot be used against him in any future trial, the statute does not confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

29 AM JUR 2d, Evidence §§ 434, 435; AM JUR, Searches and Seizures (1st ed §§ 6–13)

17 AM JUR PROOF OF FACTS 1, Tape Recordings as Evidence

US DIGEST ANNO, Appeal and Error § 1562; Evidence § 681.3; Search and Seizure §§ 8, 23–28

ALR DIGESTS, Evidence §§ 712, 984(9); Search and Seizure §§ 2–12

L ED INDEX TO ANNO, Evidence; Search and Seizure

ALR QUICK INDEX, Eavesdropping; Electronic Eavesdropping Device; Search and Seizure

ANNOTATION REFERENCES

Eavesdropping as violating right of privacy. 11 ALR3d 1296.

Right of privacy. 138 ALR 22, 168 ALR 446, 14 ALR2d 750.

Admissibility, in criminal prosecution, of evidence secured by mechanical or electronic eavesdropping device. 97 ALR2d 1283.

Admissibility of sound recordings in evidence. 58 ALR2d 1024.

Admissibility of evidence of fact of making or receiving telephone calls. 13 ALR2d 1409.

Memorandum of telephone conversation as admissible in evidence. 167 ALR 405.

Admissibility of telephone conversations in evidence. 71 ALR 5, 105 ALR 326.

Admissibility of evidence obtained by governmental or other public officer by intercepting letter or telegraph or telephone message. 53 ALR 1485, 66 ALR 397, 134 ALR 614.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

Transiently occupied room in hotel, motel, or roominghouse as within provision forbidding unreasonable searches and seizures. 86 ALR2d 984.

Premises temporarily unoccupied as dwelling within provision forbidding unreasonable search of dwellings. 33 ALR2d 1430.

Validity and adequacy, as a matter of constitutional law, of federal statute granting immunity in lieu of privilege against self-incrimination. 100 L ed 533, 5 L ed 2d 249.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination. 53 ALR2d 1030.

Necessity and sufficiency of assertion of privilege against self-incrimination, as condition of statutory immunity of witness from prosecution. 145 ALR 1416.

Constitutional Law § 101; Search and Seizure § 5; States § 33.5 — right of privacy

2. The Fourth Amendment, prohibiting unreasonable searches and seizures, cannot be translated into a general constitutional "right to privacy"; other provisions of the Constitution protect personal privacy from other forms of governmental invasion, such as the First Amendment's imposing limitation upon governmental abridgment of freedom to associate and privacy in one's associations, the Third Amendment's prohibiting the unconsented peacetime quartering of soldiers, and to some extent, the Fifth Amendment's reflecting the Constitution's concern for the right of each individual to a private enclave where he may lead a private life, whereas the protection of a person's general right to privacy is, like the protection of his property and of his very life, left largely to the law of the individual states.

Privacy § 1 — right to

3. The right of privacy is the right to be let alone by other people.

Search and Seizure §§ 5, 8 — Fourth Amendment

4. The Fourth Amendment protects people, not places.

Search and Seizure § 8 — protected area

5. A private home is an area protected by the Fourth Amendment, but an open field is not.

Search and Seizure § 8 — protected area

6. While the Supreme Court of the United States has occasionally described its conclusions as to the scope of the Fourth Amendment in terms of "constitutionally protected areas," the court has never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

Search and Seizure § 8 — protected area — exposure to public

7. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Search and Seizure § 8 — protected areas — telephone booth

8. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment, since one who occupies it is entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Search and Seizure § 23 — eavesdropping

9. The Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements that are overheard without any technical trespass under local law; the reach of the amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Search and Seizure § 23 — electronic listening device — telephone booth

10. The government's activities in attaching an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his calls constitutes a "search and seizure" within the meaning of the Fourth Amendment; the fact that the electronic device employed did not penetrate the wall of the booth has no constitutional significance.

Search and Seizure § 26 — electronic devices — judicial order

11. A judicial order may authorize the carefully limited use of electronic surveillance.

Search and Seizure § 29 — notice of purpose

12. Officers need not announce their purpose before conducting an authorized search if such an announcement

would provoke the escape of the suspect or the destruction of critical evidence.

Search and Seizure § 29 — electronic surveillance — notice

13. Considerations as to notice to be given by police officers as a prerequisite to search and seizure are not relevant to the problems presented by judicially authorized electronic surveillance.

Search and Seizure § 29 — service of warrant — time

14. Federal Criminal Procedure Rule 41(d), requiring federal officers to serve upon the person searched a copy of the warrant, does not invariably require that this be done before the search takes place.

Search and Seizure § 25 — electronic surveillance — without judicial sanction

15. The attaching by FBI agents, of an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his call, constitutes a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures, in the absence of an antecedent order judicially sanctioning such surveillance upon the officers' presentation of their estimate of probable cause, and requiring them to observe precise limits and to notify the authorizing magistrate in detail of all that has been seized.

Search and Seizure § 25 — necessity of warrant

16. Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, such as searches incident to a lawful arrest or searches with the suspect's consent.

Search and Seizure § 12 — incident to arrest — electronic surveillance

17. Electronic surveillance substantially contemporaneous with an individual's arrest can hardly be deemed an "incident" of that arrest, within the meaning of the rule that the Fourth Amendment does not prohibit search and seizure without a search warrant where incident to a lawful arrest.

Search and Seizure § 12 — incident to arrest — surreptitious surveillance

18. The concept of an "incidental" search, within the rule that the Fourth Amendment does not prohibit a warrantless search and seizure where incident to lawful arrest, cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

Search and Seizure § 25 — surveillance of telephone booth

19. Surveillance of a telephone booth is not exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause, at least in a situation not involving the national security.

Search and Seizure § 14 — consent

20. A search to which an individual consents meets Fourth Amendment requirements.

Appeal and Error § 1562; Evidence § 681.3 — electronic surveillance of telephone booth

21. Admission, in a criminal prosecution for transmitting wagering information by telephone, of evidence of conversations overheard by FBI agents through an electronic listening and recording device attached to the outside of a public telephone booth from which the suspect had placed his calls, requires reversal of the conviction where the government agents proceeded without the required antecedent judicial authorization that is central to the Fourth Amendment's prohibition of unreasonable searches and seizures.

Search and Seizure § 5 — unreasonableness

22. Wherever a man may be, he is entitled to know that he will remain

free from unreasonable searches and seizures.

Point from Separate Opinion

Search and Seizure § 26 — electronic surveillance — necessity of judicial order

23. Antecedent judicial authorization of electronic surveillance is necessary even though national security matters are involved. [From separate opinion by Douglas and Brennan, JJ. Contra: Separate opinion by White, J.]

APPEARANCES OF COUNSEL

Harvey A. Schneider and **Burton Marks** argued the cause for petitioner.

John S. Martin, Jr., argued the cause for respondent.

Briefs of Counsel, p 1488, infra.

OPINION OF THE COURT

*[389 US 348]

*Mr. Justice **Stewart** delivered the opinion of the Court.

[1] The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute.[1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth

*[389 US 349]

Amendment, *because "[t]here was no physical entrance into the area occupied by [the petitioner]."[2] We granted certiorari in order to consider the constitutional questions thus presented.[3]

1. 18 USC § 1084. That statute provides in pertinent part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

2. 369 F2d 130, 134.

3. 386 US 954, 18 L ed 2d 102, 87 S Ct 1021. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do not reach that issue.

[1] We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat 1096, as amended, 47 USC § 409(*l*), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He condends that his conviction must be vacated and the charges against him dismissed lest he be "subjected to [a] penalty . . . on

The petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

*[389 US 350]

*"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United State Constitution."

[2, 3] We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[5] But the protection of a person's *general* right to privacy—his right to be let alone

*[389 US 351]

by other people[6]—is, like the *protection of his property and of his very life, left largely to the law of the individual States.[7]

[4–7] Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from

account of [a] . . . matter . . . concerning which he [was] compelled . . . to testify . . . ." 47 USC § 409(*l*). Frank v United States, 347 F2d 486. We disagree. In relevant part, § 409(*l*) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat 443, 49 USC § 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. Counselman v Hitchcock, 142 US 547, 585–586, 35 L ed 1110, 1121, 1122, 12 S Ct 195. The statutory provision here involved was designed to provide such protection, see Brown v United States, 359 US 41, 45–46, 3 L ed 2d 609, 613, 614, 79 S Ct 539, not to confer immunity from punishment pursuant to a *prior* prosecution and adjudication of guilt. Cf. Reina v United States, 364 US 507, 513–514, 5 L ed 2d 249, 255, 81 S Ct 260.

4. "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." Griswold v Connecticut, 381 US 479, 509, 14 L ed 2d 510, 530, 85 S Ct 1678 (dissenting opinion of Mr. Justice Black).

[2] 5. The First Amendment, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." NAACP v Alabama, 357 US 449, 462, 2 L ed 2d 1488, 1499, 78 S Ct 1163. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life." ' " Tehan v Shott, 382 US 406, 416, 15 L ed 2d 453, 460, 86 S Ct 459. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

6. See Warren & Brandeis, The Right to Privacy, 4 Harv L Rev 193 (1890).

7. See, e. g., Time, Inc. v Hill, 385 US 374, 17 L ed 2d 456, 87 S Ct 534. Cf. Breard v Alexandria, 341 US 622, 95 L ed 1233, 71 S Ct 920, 35 ALR2d 335; Kovacs v Cooper, 336 US 77, 93 L ed 513, 69 S Ct 448, 10 ALR2d 608.

which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v United States, 385 US 206, 210, 17 L ed 2d 312, 315, 87 S Ct 424; United States v Lee, 274 US 559, 563, 71 L ed 1202, 1204, 47 S Ct 746. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally pro-

*[389 US 352]

tected. *See Rios v United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431; Ex parte Jackson, 96 US 727, 733, 24 L ed 877, 879.

[8] The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

[9] The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to fore-

[5] 8. In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, but that an open field is not. Hester v United States, 265 US 57, 68 L ed 898, 44 S Ct 445. Defending the inclusion of a telephone booth in his list the petitioner cites United States v Stone, 232 F Supp 396, and United States v Madison, 32 LW 2243 (DC Ct Gen Sess). Urging that the telephone booth should be excluded, the Government finds support in United States v Borgese, 235 F Supp 286.

[6] 9. It is true that this Court has occasionally described its conclusion in terms of "constitutionally protected areas," see, e. g., Silverman v United States, 365 US 505, 510, 512, 5 L ed 2d 734, 738, 739, 81 S Ct 679, 97 ALR2d 1277; Lopez v United States, 373 US 427, 438–439, 10 L ed 2d 462, 469, 470, 83 S Ct 1381; Berger v New York, 388 US 41, 57, 59, 18 L ed 2d 1040, 1051, 1052, 87 S Ct 1873, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

10. Silverthorne Lumber Co. v United States, 251 US 385, 64 L ed 319, 40 S Ct 182, 24 ALR 1426.

11. Jones v United States, 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR2d 233.

12. Rios v United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431.

close further Fourth Amendment inquiry, Olmstead v United States, 277 US 438, 457, 464, 466, 72 L ed 944, 947, 950, 951, 48 S Ct 564, 66 ALR 376; Goldman v United States, 316 US 129, 134–136, 86 L ed 1322, 1327, 1328, 62 S Ct 993, for that Amendment was thought to limit only searches and seizures of tangible

*[389 US 353]

*property.[13] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." Warden v Hayden, 387 US 294, 304, 18 L ed 2d 782, 790, 87 S Ct 1642. Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." Silverman v United States, 365 US 505, 511, 5 L ed 2d 734, 739, 81 S Ct 679, 97 ALR2d 1277. Once this much is acknowledged, and once it is recognized that the Fourth Amendment * protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

[10] We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

*[389 US 354]

*The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth,[14] and they took

13. See Olmstead v United States, 277 US 438, 464–466, 72 L ed 944, 950, 951, 48 S Ct 564, 66 ALR 376. We do not deal in this case with the law of detention or arrest under the Fourth Amendment.

14. Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information.

great care to overhear only the conversations of the petitioner himself.[15]

[11–14] Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sus-

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*tained the validity of *such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." Osborn v United States, 385 US 323, 329–330, 17 L ed 2d 394, 399, 87 S Ct 429. Discussing that holding, the Court in Berger v New York, 388 US 41, 18 L ed 2d 1040, 87 S Ct 1873, said that "the order authorizing the use of the electronic device" in Osborn "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." Id., at 57, 18 L ed 2d at 1051.[16] Here, too, a similar

15. On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

[12] 16. Although the protections afforded the petitioner in Osborn were "*similar* . . . to those . . . of conventional warrants," they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in Osborn simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See Ker v California, 374 US 23, 37–41, 10 L ed 2d 726, 740–742, 83 S Ct 1623.

[13] Although some have thought that this "exception to the notice requirement where exigent circumstances are present," id., at 39, 10 L ed 2d at 741, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, id., at 55–58, 10 L ed 2d at 750–752 (opinion of Mr. Justice Brennan), the reasons for such a limitation have no bearing here. However true it may be that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," id., at 57, 10 L ed 2d at 752, and that "the requirement of awareness . . . serves to minimize the hazards of the officers' dangerous calling," id., at 57–58, 10 L ed 2d at 752, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

[14] Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. Nordelli v United States, 24 F2d 665, 666–667.

Thus the fact that the petitioner in Osborn was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in Berger from reaching the conclusion that the use of the recording device sanctioned in Osborn was entirely lawful. 388

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*judicial order could have accommodated "the legitimate needs of law enforcement"[17] by authorizing the carefully limited use of electronic surveillance.

[15, 16] The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least

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intrusive *means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," Agnello v United States, 269 US 20, 33, 70 L Ed 145, 149, 46 S Ct 4, 51 ALR 409, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." Wong Sun v United States, 371 US 471, 481–482, 9 L ed 2d 441, 451, 83 S Ct 407. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v Jeffers, 342 US 48, 51, 96 L ed 59, 64, 72 S Ct 93, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[18]—subject only to a few specifically established and well-delineated exceptions.[19]

[17–20] It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed

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an "incident" of that arrest.[20] *Nor could the use of electronic surveil-

US 41, 57, 18 L ed 2d 1040, 1051, 87 S Ct 1873.

17. Lopez v United States, 373 US 427, 464, 10 L ed 2d 462, 484, 83 S Ct 1381 (dissenting opinion of Mr. Justice Brennan).

18. See, e. g., Jones v United States, 357 US 493, 497–499, 2 L ed 2d 1514, 1518, 1519, 78 S Ct 1253; Rios v United States, 364 US 253, 261, 4 L ed 2d 1688, 1693, 80 S Ct 1431; Chapman v United States, 365 US 610, 613–615, 5 L ed 2d 828, 831, 832, 81 S Ct 776; Stoner v California, 376 US 483, 486–487, 11 L ed 2d 856, 858, 859, 84 S Ct 889.

19. See, e. g., Carroll v United States, 267 US 132, 153, 156, 69 L ed 543, 551, 552, 45 S Ct 280, 39 ALR 790; McDonald v United States, 335 US 451, 454–456, 93 L ed 153, 157, 158, 69 S Ct 191; Brinegar v United States, 338 US 160, 174–177, 93 L ed 1879, 1889–1891, 69 S Ct 1302; Cooper v California, 386 US 58, 17 L ed 2d 730, 87 S Ct 788; Warden v Hayden, 387 US 294, 298–300, 18 L ed 2d 782, 787, 788, 87 S Ct 1642.

20. In Agnello v United States, 269 US 20, 30, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected

lance without prior authorization be justified on grounds of "hot pursuit."[21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v Ohio, 379 US 89, 96, 13 L ed 2d 142, 147, 85 S Ct 223.

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from
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Fourth Amendment *violations "only in the discretion of the police." Id., at 97, 13 L Ed 2d at 148.

[21, 22] These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment,"[24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

Mr. Justice **Marshall** took no part in the consideration or decision of this case.

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with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

[18] Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," United States v Rabinowitz, 339 US 56, 61, 94 L ed 653, 658, 70 S Ct 430; cf. id., at 71–79, 94 L ed at 663–667 (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

21. Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," Warden v Hayden, 387 US 294, 298–299, 18 L ed 2d 782, 787, 87 S Ct 1642, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[20] 22. A search to which an individual consents meets Fourth Amendment requirements, Zap v United States, 328 US 624, 90 L ed 1477, 66 S Ct 1277, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." Lopez v United States, 373 US 427, 463, 10 L ed 2d 462, 485, 83 S Ct 1381 (dissenting opinion of Mr. Justice Brennan).

23. Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

24. See Osborn v United States, 385 US 323, 330, 17 L ed 2d 394, 400, 87 S Ct 429.

SEPARATE OPINIONS

Mr. Justice **Douglas**, with whom Mr. Justice **Brennan** joins, concurring.

[23] While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother White, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather

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it should vigorously investigate *and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, § 3, gives "treason" a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests in cases of "hot pursuit" and the arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

Mr. Justice **Harlan**, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, and unlike a field, Hester v United States, 265 US 57, 68 L ed 898, 44 S Ct 445, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the

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Fourth Amendment; *and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states. "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has

emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v United States, supra.

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. Ante, at 582. The point is not that the booth is "accessible to the public" at other times, ante, at 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431.

In Silverman v United States, 365 US 505, 5 L ed 2d 734, 81 S Ct 679, 97 ALR2d 1277, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth

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Amendment. *That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in Wong Sun v United States, 371 US 471, at 485, 9 L ed 2d 441, at 453, 83 S Ct 407, and Berger v New York, 388 US 41, at 51, 18 L ed 2d 1040, at 1047, 87 S Ct 1873. Also compare Osborn v United States, 385 US 323, at 327, 17 L ed 2d 394, at 398, 87 S Ct 429. In Silverman we found it unnecessary to re-examine Goldman v United States, 316 US 129, 86 L ed 1322, 62 S Ct 993, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree that it should now be overruled.† Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

† I also think that the course of development evinced by Silverman, supra, Wong Sun, supra, Berger, supra, and today's decision must be recognized as overruling Olmstead v United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.

Mr. Justice **White**, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be
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subjected *to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.†

[23] In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See Berger v New York, 388 US 41, 112–118, 18 L ed 2d 1040, 1083–1086, 87
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S Ct 1873 (1967) (White, J., *dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Mr. Justice **Black**, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion. For on that premise my Brother Stewart sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from Berger v New York, 388 US 41, 18 L ed 2d 1040, 87 S Ct 1873, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The Berger case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and

† In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v United States, 385 US 293, 17 L ed 2d 374, 87 S Ct 408 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v United States, 373 US 427, 10 L ed 2d 462, 83 S Ct 1381 (1963); Osborn v United States, 385 US 323, 17 L ed 2d 394, 87 S Ct 429 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, On Lee v United States, 343 US 747, 96 L ed 1270, 72 S Ct 967 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v United States, supra. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

abates to a large extent the confusion and near-paralyzing effect of the Berger holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

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*While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdroppings whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that infor-

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mation showing what *is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in Berger, supra, recognized, "an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond

their walls seeking out private discourse." 388 US, at 45, 18 L ed 2d at 1044. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal

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construction. This *principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, e. g., Olmstead v United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376 (1928), and Goldman v United States, 316 US 129, 86 L ed 1322, 62 St Ct 993 (1942).

So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in Berger last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, Olmstead, supra. In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

"The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to

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make the proceeding lawful, is *that it must specify the place to be searched and the person or *things* to be seized. . . .

. . . . . .

"Justice Bradley in the Boyd case [Boyd v United States, 116 US 616, 29 L Ed 746, 6 S Ct 524], and Justice Clark[e] in the Gouled case [Gouled v United States, 255 US 298, 65 L Ed 647, 41 S Ct 261], said that the Fifth Amendment and

the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." 277 US, at 464–465, 72 L Ed at 950, 66 ALR 376.

Goldman v United States, 316 US 129, 86 L ed 1322, 62 S Ct 993, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to Olmstead, found no Fourth Amendment violation.

It should be noted that the Court in Olmstead based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, supra, in the cited quotation from the case, the Court went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing Hester v United States, 265 US 57, 68 L ed 898, 44 S Ct 445, indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by "hearing or

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*sight." The Olmstead majority characterized Hester as holding "that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects." 277 US, at 465, 72 L ed at 951, 66 ALR 376. Thus the clear holding of the Olmstead and Goldman cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the Olmstead and Goldman cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in Berger v New York, 388 US 41, 76, 18 L ed 2d 1040, 1062, 87 S Ct 1873, I continue to believe that this exclusionary rule formulated in Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the Fourth Amendment. See Wolf v Colorado, concurring opinion, 338 US 25, at 39, 40, 93 L Ed 1782, at 1791, 1792, 69 S Ct 1359. See also Mapp v Ohio, concurring opinion, 367 US 643, 661–666, 6 L Ed 2d 1081, 1093–1096, 81 S Ct 1684, 84 ALR2d 933. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this

Court said in Lopez v United States, 373 US 427, 438–439, 10 L ed 2d 462, 470, 83 S Ct 1381, "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear

*[389 US 370]

[citing *Olmstead and Goldman]. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v United States."

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of Olmstead and Goldman have been . . . eroded by our subsequent decisions. . . ." But the only cases cited as accomplishing this "eroding" are Silverman v United States, 365 US 505, 5 L ed 2d 734, 81 S Ct 679, 97 ALR2d 1277, and Warden v Hayden, 387 US 294, 18 L ed 2d 782, 87 S Ct 1642. Neither of these cases "eroded" Olmstead or Goldman. Silverman is an interesting choice since there the Court expressly refused to re-examine the rationale of Olmstead or Goldman although such a reexamination was strenuously urged upon the Court by the petitioners' counsel. Also it is significant that in Silverman, as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," 365 US at 509, 5 L Ed 2d at 738, 97 ALR2d 1277, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." (At 511, 5 L Ed 2d p 739, 97 ALR2d 1277.) Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: "For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners." (P 509, 5 L ed 2d p 738, 97 ALR2d 1277, emphasis added.)

*[389 US 371]

"Eavesdropping *accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions . . . ." (P 509, 5 L ed 2d p 738, 97 ALR2d 1277, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office . . . ." (P 511, 5 L ed 2d p 739, 97 ALR2d 1277, emphasis added.) "[D]ecision here . . . is based upon the reality of an *actual intrusion* . . . ." (P 512, 5 L ed 2d p 739, 97 ALR2d 1277, emphasis added.) "We find no occasion to re-examine Goldman here, but we decline to go beyond it, *by even a fraction of an inch.*" (P 512, 5 L ed 2d p 739, 97 ALR2d 1277, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: "In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to re-

move this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion." (P 513, 5 L ed 2d p 740, 97 ALR2d 1277, emphasis added.) As I made clear in my dissent in Berger, the Court in Silverman held the evidence should be excluded by virtue of the exclusionary rule and "I would not have agreed with the Court's opinion in Silverman . . . had I thought that the result depended on finding a violation of the Fourth Amendment . . . ." 388 US, at 79–80, 18 L ed 2d at 1064. In light of this and the fact that the Court expressly refused to reexamine Olmstead and Goldman, I cannot read Silverman as overturning the interpretation stated very plainly in Olmstead and followed in Goldman that eavesdropping is not covered by the Fourth Amendment.

The other "eroding" case cited in the Court's opinion is Warden v Hayden, 387 US 294, 18 L ed 2d 782, 87 S Ct 1642. It appears that this case is cited for the proposition that the Fourth Amendment applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the Government to search and seize has been discredited." 387 US, at 304, 18 L ed 2d at 790. But

*[389 US 372]

far from being concerned *with eavesdropping, Warden v Hayden upholds the seizure of *clothes*, certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today Olmstead and Goldman are no longer good law, it must face up to the fact that these cases have never been overruled or even "eroded." It is the Court's opinions in this case and Berger which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversations can be "seized."† I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

*[389 US 373]

*Since I see no way in which the words of the Fourth Amendment can be construed to apply to eaves-

† The first paragraph of my Brother Harlan's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the Fourth Amendment and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a citation to Silverman, and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read Silverman as holding any such thing; and in the second place, Silverman was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother Harlan recognizes this later in his opinion when he admits that the Court must now overrule Olmstead and Goldman. In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother Harlan's claim that it is "bad physics" to adhere to Goldman. Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

dropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in Griswold v Connecticut, 381 US 479, 14 L ed 2d 510, 85 S Ct 1678, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which

*[389 US 374]

might abridge the 'privacy' *of individuals. But there is not." (Dissenting opinion, p 508, 14 L ed 2d p 529.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures.'" (See generally dissenting opinion, pp 507–527, 14 L ed 2d pp 528–540.)

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

[2010] 1 WLR 123

*Regina (Wood) *v* Commissioner of Police of the Metropolis

Court of Appeal

*Regina (Wood) *v* Commissioner of Police of the Metropolis

[2009] EWCA Civ 414

2009 Jan 28, 29; May 21

Laws, Dyson LJJ, Lord Collins of Mapesbury

Human rights — Right to respect for private life — Photographs taken in public place — Police taking photographs of claimant in street — Photographs retained on possibility that public order offences might be committed — Whether taking and retention of photographs by police engaging Convention right to respect for private life — Whether taking and retention of photographs for prevention of crime legitimate aim — Whether in accordance with law — Whether proportionate to aim — Whether interference with claimant's Convention rights justified — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8

The claimant, who was employed by an association which campaigned against the arms trade, attended the annual general meeting of R plc, which had an association with a company organising trade fairs for, inter alia, the arms industry. Because of that association there was concern that there might be demonstrations at the meeting, or at a later trade fair, and the Metropolitan Police decided to deploy a number of police officers around the hotel where the meeting was taking place. Photographs were taken of the claimant in the street as he was leaving the hotel after the meeting and police officers under the defendant police commissioner's direction and control made attempts to establish his identity. There was no evidence that the claimant had been involved in any disturbance at the meeting; he had no criminal convictions and had never been arrested as a result of any campaigning activities or otherwise. He sought judicial review by way of a declaration that the police actions were unlawful and in violation of his rights under, inter alia, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 19981. The judge found that any interference with his rights under the Convention was in accordance with the law and was justified and dismissed the claim.

On the claimant's appeal—

Held , (1) that, although the mere taking of photographs of a person in a public place was not capable of engaging his rights under article 8(1) of the Convention, where a state authority such as the police visibly and with no obvious cause chose to take and retain photographs of an individual going about his lawful business in the street that was a sufficient intrusion by the state into the individual's privacy as to amount to a prima facie violation of his rights under article 8(1); that the taking and retention of the photographs of the claimant were in pursuance of a legitimate aim, namely "the prevention of disorder or crime", or "the protection of the rights and freedoms of others", for the purposes of article 8(2); and that the question whether that interference with the claimant's rights under article 8(1) was proportionate to the legitimate aim being pursued, so as to be justified as necessary in a democractic society, was a fact-sensitive question (post, paras 27 , 36 , 37 , 39 , 45 –46 , 48 , 64 , 79 , 85 , 96)

(2) Allowing the appeal (Laws LJ dissenting), that the required justification for the retention by the police of photographs of an individual had to be the more compelling where the interference with his rights was in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed to protection against the danger of terrorism or really serious criminal activity; that it was for the defendant to justify the interference with the claimant's article 8 rights as proportionate; that, in the circumstances, he had failed to do so; and that, accordingly, the interference with the claimant's rights was not justified under article 8(2) (post, paras 64 , 84 , 86 , 87 –89 , 90 , 91 , 97).

R (Gillan) v Commisioner of Police of the Metropolis [2006] 2 AC 307, HL(E) and *S v United Kingdom* (2008) 48 EHRR 1169, GC considered.

Quaere. Whether the interference with the claimant's Convention rights was "in accordance with the law" for the purposes of article 8(2) (post, paras 51 , 53 , 54 , 55 , 80 –81 , 98 –100).

Malone v United Kingdom (1984) 7 EHRR 14 and *Murray v United Kingdom* (1994) 19 EHRR 193 considered.

Decision of McCombe J [2008] EWHC 1105 (Admin); [2008] HRLR 817 reversed.

The following cases are referred to in the judgments:

Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)

Friedl v Austria (1995) 21 EHRR 83

Iordachi v Moldova (Application No 25198/02) (unreported) given 10 February 2009, ECtHR

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)

Liberty v United Kingdom (2008) 48 EHRR 1

Malone v United Kingdom (1984) 7 EHRR 14

Murray v Express Newspapers plc [2008] EWCA Civ 446; [2009] Ch 481; [2008] 3 WLR 1360, CA

Murray v United Kingdom (1994) 19 EHRR 193

R (Gillan) v Comr of Police of the Metropolis [2006] UKHL 12; [2006] 2 AC 307; [2006] 2 WLR 537; [2006] 4 All ER 1041, HL(E)

R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)

Rice v Connolly [1966] 2 QB 414; [1966] 3 WLR 17; [1966] 2 All ER 649, DC

S v United Kingdom (2008) 48 EHRR 1169, GC

Silver v United Kingdom (1983) 5 EHRR 347

Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35

Von Hannover v Germany (2004) 40 EHRR 1

X v United Kingdom (Application No 5877/72) (unreported) given 12 October 1973, EComHR

The following additional cases were cited in argument:

Acmanne v Belgium (1984) 40 DR 251

Doorson v The Netherlands (1996) 22 EHRR 330

Lupker v The Netherlands (Application No 18395/91) (unreported) given 7 December 1992, EComHR

McKennitt v Ash [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194, CA

PG v United Kingdom (2001) 46 EHRR 1272

Peck v United Kingdom (2003) 36 EHRR 719

Perry v United Kingdom (2003) 39 EHRR 76

Reyntjens v Belgium (1992) 73 DR 136

Schüssel v Austria (Application No 42409/98) (unreported) given 21 February 2002, ECtHR

Sunday Times v United Kingdom (1979) 2 EHRR 245

The following additional cases, although not cited, were referred to in the skeleton arguments:

Amann v Switzerland (2000) 30 EHRR 843

Bladet Tromsø v Norway (2000) 29 EHRR 125, GC

D v East Berkshire Community Health NHS Trust [2003] EWCA Civ 1151; [2004] QB 558; [2004] 2 WLR 58; [2003] 4 All ER 796, CA

E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351, CA

Halford v United Kingdom (1997) 24 EHRR 523

Kinnunen v Finland (Application No 24950/94) (unreported) given 15 May 1996, EComHR

M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)

McVeigh, O'Neill and Evans v United Kingdom (1981) 5 EHRR 71

Pretty v United Kingdom (2002) 35 EHRR 1

R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd [1999] 2 AC 418; [1998] 3 WLR 1260; [1999] 1 All ER 129, HL(E)

R v Comr of Police of the Metropolis, Ex p Blackburn [1968] 2 QB 118; [1968] 2 WLR 893; [1968] 1 All ER 763, CA

R v Loveridge [2001] EWCA Crim 973; [2001] 2 Cr App R 591, CA

R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin); [2004] Prison LR 65

R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 AC 148; [2005] 3 WLR 793; [2006] 4 All ER 736, HL(E)

R (ProLife Alliance) v British Broadcasting Corpn [2003] UKHL 23; [2004] 1 AC 185; [2003] 2 WLR 1403; [2003] 2 All ER 977, HL(E)

R (Purdy) v Director of Public Prosecutions [2008] EWHC 2565 (Admin); [2009] HRLR 171, DC

R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2008] UKHL 63; [2009] AC 311; [2008] 3 WLR 1023, HL(E)

Rotaru v Romania (2000) 8 BHRC 449, GC

S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)

Sciacca v Italy (2005) 43 EHRR 400

Segerstedt-Wiberg v Sweden (2006) 44 EHRR 14

Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 4 All ER 969, HL(E)

APPEAL from McCombe J

By a claim form dated 25 October 2005 the claimant, Andrew Wood, sought judicial review of the decision of officers under the direction and control of the defendant, the Commissioner of Police of the Metropolis, to photograph him and try to obtain details of his identity at the annual general meeting of Reed Elsevier plc held on 27 April 2005, on the grounds that those actions were unlawful and in violation of his rights under articles 8, 10, 11 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 22 May 2008 McCombe J [2008] HRLR 817 dismissed the claim, holding that those articles were not engaged and that there was no interference with the claimant's rights in the taking and retention of the photographs.

By an appellant's notice dated 20 June 2008 and pursuant to permission granted by McCombe J on 19 June 2008 the claimant appealed on the grounds, inter alia, that (1) in holding that there had been no interference with the claimant's article 8, 10, 11 and 14 rights the judge had failed to take into account all the intrusive circumstances in which the photographs had been taken, including in particular the fact that they had been taken in a public street by officers of the state without any explanation; (2) the judge had failed to draw a distinction between the use of photographs in the investigation of a specific past offence and the retention of photographs with a view to policing future events where no offence had been committed; (3) the judge had erred in finding that the interference was justified and proportionate; (4) the conduct did not meet the recognised requirements of accessibility, certainty and precision now recognised by European jurisprudence; and (5) the judge had erred in finding that the claimant had not been unjustifiably discriminated against in comparison with others attending the same meeting.

The facts are stated in the judgment of Laws LJ.

Martin Westgate (instructed by *Liberty*) for the claimant.

Sam Grodzinski (instructed by *Director of Legal Services, Metropolitan Police*) for the defendant.

The court took time for consideration.

21 May 2009. The following judgments were handed down.

LAWS LJ

Introduction

1 This is an appeal against the judgment of McCombe J [2008] HRLR 817 given in the Administrative Court on 22 May 2008 by which he dismissed the claimant's claim for judicial review. The claimant's complaint was and is that officers of the defendant commissioner's police force had taken and retained photographs of him in central London in the context of a meeting on 27 April 2005 in Grosvenor Square, and that these actions were unlawful and in violation of his rights guaranteed by articles 8, 10, 11 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Permission to appeal was granted by the judge below.

The facts

The judge's account

2 The following account, taken from the judge's judgment, at paras 3–18, gives the primary facts. After setting it out I must address certain further matters which are of some importance.

> "3. At the relevant time the claimant was a media co-ordinator employed by an unincorporated association known as Campaign against Arms Trade ('CAAT'). CAAT's name clearly indicates its objects. The claimant had and has no criminal convictions and has never been arrested as a result of any campaigning activities or otherwise.
>
> "4. Reed Elsevier plc ('Reed') was the parent company of Spearhead Exhibitions Ltd ('Spearhead') which is concerned in the organisation of trade fairs for various industries, including the arms industry. One of the events with which it has been concerned is an exhibition held every other year in London called Defence Systems and Equipment International ('DSEi'). Because of the association with Spearhead, Reed's offices in this country had been subjected to demonstrations, some involving criminal damage. Other damage had been caused to Reed's premises in the Netherlands.
>
> "5. Prior to Reed's annual general meeting on 27 April 2005 (due to take place at an hotel in Grosvenor Square in London) the police were contacted by a member of Spearhead staff explaining that the company had recently noted the purchase of single shares entitling the new holders to attend the forthcoming AGM. Some five or six share transactions were said to have involved members of CAAT. One individual known to hold a proxy for a shareholder was a woman, called in this case 'EA', a member of CAAT until 2003, who had a history of unlawful activity against organisations involved in the defence industry and had been convicted of a number of offences in that context.
>
> "6. The defendant took the view that there was a real possibility of demonstration at the annual general meeting and that unlawful activity might occur. He (or his senior officers) therefore decided to deploy a number of officers around the hotel where the meeting was to be held. One inspector, three sergeants and 21 constables were so allocated. In addition, two 'forward

intelligence teams' ('FITs') of three and two officers respectively and an 'evidence gathering ('EG') team' of three officers and a civilian photographer were engaged. These officers were in uniform and the photographer, although a civilian, wore a uniform identifying him as engaged with the police.

"7. The EG team gathers intelligence by taking photographs and making notes of significant events which may be thought to be of potential evidential value; the FIT teams are used to monitor people's movements at events of the kind in question to assist in the efficient deployment of resources.

"8. Before the meeting a CAAT member ('KB') approached the officer in charge and asked to hand out leaflets at the hotel entrance to those attending the annual general meeting. The officer agreed to this on the understanding that no obstruction would be caused and KB would be acting alone. KB did carry on her leafleting activity without problems arising.

"9. The claimant attended the annual general meeting having previously bought a share in Reed. He attended with about six other CAAT members, but entered the meeting with only one other. He states that his purpose was to learn more about Reed's involvement with Spearhead and to ask appropriate questions.

"10. At the meeting two people, EA (already mentioned) and one RH, were ejected by private security staff, apparently after chanting slogans. There is no suggestion that the claimant was in any way involved in this activity. His participation appears to have been confined to asking one unobjectionable question. There appears to have been no other disturbance at the meeting.

"11. The claimant left the meeting as soon as formal business was over, without staying for the social reception held thereafter for which other shareholders did stay. He left the hotel in the company of another CAAT employee, a Mr Ian Prichard. They spoke to KB and, while they were doing so, a man (whom the claimant believed to be a police officer, but who was in fact the civilian photographer already mentioned) got out of a police vehicle and began to take photographs. There is a dispute as to how many photographs were taken but the claimant's evidence is that the photographer was working continuously for some time and approached to within two metres of the claimant and Mr Prichard. The photographer says that he customarily tries to keep a safe distance from subjects in order not to invade their 'personal space' and for his own safety and the safety of his equipment. In evidence, seven images have been produced of which only two show the claimant clearly.

"12. The claimant complains that he was not told the reason why the photographs were being taken. On the other hand, it appears that he did not ask the officers for the reason either.

"13. The defendant's evidence is that, after eviction from the meeting, EA joined KB outside the hotel. It is stated that the claimant and Mr Prichard stopped to speak to KB (as they accept) and that they were joined by EA. The claimant says that he cannot recall EA joining the group. In his evidence, a sergeant from the EG team states that he decided that it was appropriate to photograph the claimant and to try to establish his identity. His reasons for doing so were the sighting of the claimant in a group with EA and the possibility that unlawful activity in the meeting, from which EA had been ejected, might later come to light. Other officers also give evidence of having seen the claimant with EA at this time.

"14. The claimant and Mr Prichard walked away from the hotel towards an underground railway station. They were followed by officers from the EG team.

The claimant says that a police vehicle pulled up near to him and Mr Prichard and about four officers came and stood near to them. The claimant was asked for his identity, as was Mr Prichard. Mr Prichard identified himself, but the claimant asked whether he was obliged to do so and, on being told he was not, declined to answer. They both refused to answer questions about the annual general meeting. They were told that they were free to leave the scene and that they were not being detained, although two officers then followed them to the station, trying at one stage to get the assistance of railway staff to obtain the claimant's identity from the claimant's travel document. The defendant's evidence is that the two men were followed in order to see whether they were truly leaving the area or whether they might return to the venue of the annual general meeting or become involved with a different demonstration which was thought by the police to be occurring in St James's Square. There is no evidence to suggest that the exchanges between the police on the one hand and the claimant and Mr Prichard on the other hand were other than polite on each side.

"15. The defendant has adduced detailed evidence as to retention of photographs taken in such circumstances as these. It appears that they are retained subject to strict controls. Usually they are kept only for use by officers of the Public Order Branch of the force. Copies are not permitted to be taken outside the offices of that branch. The one exception to this is that at future public events where there is a potential need to identify persons involved in unlawful activity, who may have participated in similar events previously, a sheet of relevant images may be given to a limited number of EG and/or FIT team members. However, the images do not identify the names of those depicted, each image merely being allocated a code. The sheets are returned after the event and are then destroyed.

"16. It seems that, in this case, the police did subsequently find out the claimant's identity. They apparently found from company records the names of the new shareholders in Reed. They were able to ascertain the identities of all others, apart from the claimant, and by process of elimination worked out that the person photographed in the company of Mr Prichard and others was the claimant.

"17. The perceived need for photographs generally in the present case appears to have been because of police fears of unlawful activity at the DSEi event to be held in September 2005, after the disturbances at Reed's premises in this country and in the Netherlands, and the association on this occasion of the claimant and others with EA who had previous convictions for unlawful activities in related manifestations. The defendant says that, but for the proceedings in this court, the retained photographs of the claimant would have been destroyed shortly after the September 2005 event. It is said that such photographs are not accessible for general intelligence purposes but are used only if a civil claim is made against the police in relation to the recorded events or if a specific offence has come to light and it is believed that the images may provide material evidence in relation to that offence.

"18. The claimant says that he felt scared and intimidated by the events in issue. He also says that the incident was 'extremely upsetting' and that he 'felt shaken and frightened as a result'. He says that he feels very uncomfortable that information may be kept about him indefinitely and may be used without his consent or knowledge. The defendant, through counsel, accepts that the claimant may have felt 'unsettled' by what occurred. However, the claimant relies on his unchallenged evidence to the effect that I have just outlined, asserting that the incident was more than just 'unsettling' so far as he was

concerned."

Minor matters

3 There are next two minor issues with which I can deal shortly. First, the dispute as to how many photographs were taken (para 11 in the judge's account) merely reflects the unsurprising contrast between the claimant's perception that he was being photographed continuously (para 9 of his first statement, 30 October 2005) and the fact that in the result there were only two clear "front-on" images of him: statement of the police photographer Neal Williams, 23 November 2006, para 6. Secondly the question whether there was any association outside the hotel between the claimant and the woman EA (the judge's para 13) is again a matter of perception: it is plain that officers believed there was some association, whether in fact there was or not.

What did the police hope to gain?

4 I stated, at para 2, that there were certain further matters of some importance. The first is to consider what the police hoped to gain from the exercise. On this we have in particular the statements of the officer in charge, Chief Inspector Claire Weaver (27 November 2006), and of one of the evidence gatherers, Police Sergeant David Dixon (24 November 2006). Taking them together it is clear that the pictures were taken (1) so that if disorder erupted and offences were committed (or it transpired that offences had already been committed inside the hotel), offenders could be identified, albeit at a later time if necessary; and (2) so that persons who might possibly commit public order offences at the DESi fair in September could be identified in advance: this would or might assist the police operation at the forthcoming event.

What was done with the photographs?

5 The second matter, about which for reasons that will appear I need to say rather more, is what was done with the photographs. Within the evidence that was before the judge there is first the statement of the photographer Mr Williams to which I have already referred. The pictures were initially recorded on a flash card in Mr Williams's digital camera. Copies of the original images were recorded onto three CD ROMs. Of these the master CD and a working copy were stored at the headquarters of what is called SCD4(3), which is the Forensic Science Branch of the Metropolitan Police. Mr Williams says, at para 13, that the images on these two CDs could only be read on SCD4(3) computers with the requisite software. Further copies in what is known as JPEG format were also stored at SCD4(3) headquarters. Copies in the same format were forwarded to CO11, which is the Public Order Branch. The JPEG images, as I understand it, could be viewed on any computer. The master CD, working copy, and JPEG copy were all securely stored at SCD4(3), but (Williams para 16) no information is kept there which of itself would enable anyone to correlate any particular image with an identified individual. Rather a database keeps information about the assignment on which the pictures were taken, the date, basic details of the event, the name of the photographer, and the requesting or commissioning officer (in this case Chief Inspector Weaver).

6 The part played by the Public Order Branch, CO11, in these arrangements was described by Superintendent Gomm (statement, 28 November 2006), who works in CO11. He confirms, at para 12, that after an event where overt filming has been carried out by the Metropolitan Police, the photographer forwards a CD containing the images to CO11. They are securely stored and access to them is restricted, monitored and supervised. An image is only circulated to officers outside CO11 if there is a belief that its subject may attend some future event and commit offences: para 14. In that case a numbered sheet of photographs is

circulated to the relevant officers attending the event. Each officer is required to hand in his sheet for destruction at the end of the day.

7 Images kept by CO11 are reviewed after about a year and only retained if they have any "ongoing significant intelligence value", something which is difficult to define precisely: para 12. In the present case Superintendent Gomm says, at para 13, that but for the commencement of these proceedings the images of the claimant would have been destroyed after the DSEi exhibition in September 2005, which it appears he did not attend.

8 That would likely have served as a sufficient account of the somewhat complex arrangements within the Metropolitan Police for the retention and use of photographs taken at an overt filming event, but for the receipt by the court, at a time when the preparation of this judgment was well under way, of further material from the parties. An exchange of correspondence between them was generated by an article in the *Guardian* newspaper published on 23 February 2009 headed "Britain faces summer of rage—police". The article was based in part on an interview with Superintendent Hartshorn, a senior officer within CO11. The claimant says that Superintendent Hartshorn revealed further significant information which assists his case. I directed that the parties file additional written submissions on the impact of this material by 23 March 2009, and that has been done.

9 It is submitted for the claimant that the new material shows as a matter of fact that there is a database of images, searchable by name, held within CO11; that the criteria for the inclusion of any person's image on this database are unclear; and that the sheets of photographs to which Superintendent Gomm referred (see para 6 above)—described as "spotter cards"—are sometimes supplied to members of FIT teams where the subjects "could be ... known activists. Known people who've caused us problems", and "a number of people we might be looking for".

10 The defendant's substantive observations on the factual issues arising from Superintendent Hartshorn's interview are contained in a letter to Liberty of 19 March 2009. Amongst other things it is stated that there is indeed a database of images held by CO11. In his further written submissions of 23 March 2009 counsel for the defendant complains of comments in a further piece in the *Guardian* on 7 March 2009 (the main article on the front page) that Liberty did not know about the database and that "police do not appear to have disclosed to the court [in these proceedings, which had by that date been reserved for judgment] that they were transferring the private details of campaigners to a database". In fact this database had been referred to at para 27 of the defendant's summary grounds for resistance dated 9 December 2005; no further reference was made to it because, as is common ground, the claimant's image never appeared on it. The claimant, knowing what was in the defendant's summary of grounds, advanced no argument and pursued no inquiry relating to the CO11 database.

11 As for the other points summarised in the claimant's further submissions, the letter of 19 March 2009 states the criteria for inclusion on the database: observed or suspected participation in unlawful activity at the event when the pictures were taken, or participation of such activity at an earlier time. Mere presence at a demonstration or other event is not enough. The claimant's image was never placed on a "spotter card".

12 I have thought it right to summarise this new material given the reliance placed on it by the claimant, the terms of the defendant's reply, and my own direction seeking the parties' further submissions. However for reasons I shall explain it does not, in my judgment, affect the outcome of the case and I would

not grant any formal leave to admit it as new evidence.

The published policy

13 There is also before us, as it was before the judge, evidence of a published policy evolved by the Metropolitan Police on "The use of overt filming/photography". Under the heading "Policy statement" it has this:

> "The Metropolitan Police Service ('MPS') is committed to providing MPS personnel with a particularly useful tactic to combat crime and gather intelligence and evidence relating to street crime, anti-social behaviour and public order. It may be used to record identifiable details of subjects suspected of being involved in crime or anti-sociable [sic] behaviour such as facial features, visible distinctive marks e g, tattoos, jewellery, clothing and associates for the purposes of preventing and detecting crime and to assist in the investigation for all alleged offences. This tactic may also be used to record officers' actions in the following circumstances. Maintaining public confidence and to justify police tactics. During incidents where police face substantial levels of violence, immigration arrests, detention of mentally ill persons and actions taken during high profile or critical incidents. To demonstrate to the public that cameras are deployed overtly officers should clearly identify themselves as police officers or police staff and not hide the fact that they are filming. This can be achieved by: use of uniformed officers; use of marked vehicles ... When a pre-planned deployment is authorised officers must be able to clearly state the reasons for the filming or photography and provide a copy of an explanatory leaflet. These contain details of the purpose of the filming and provide guidance on how members of the public may obtain further information and access to their images."

Then under the heading "Associated documents and policies" three items are listed, of which the first is "Standard operating procedures for 'Use of overt filming/photography'". This document has not been disclosed.

The Convention rights

14 The material provisions of the European Convention are:

> "Article 8
>
> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or ... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others."
>
> "Article 10
>
> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security ... public safety, for the prevention of disorder or crime ... for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> "Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others ..."

"Article 14

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It is not I think necessary to cite the material provisions of the Human Rights Act 1998, which gave effect to the European Convention in our domestic law. It is common ground (and elementary) that the Metropolitan Police were by law obliged to respect the claimant's Convention rights.

Article 8

15 The principal issue in the case as the argument has developed is whether the claimant's right to respect for his private life, guaranteed by article 8 of the European Convention, was violated by the police taking and retaining photographs of him on 27 April 2005.

(1) The scope of article 8

16 Article 8 is one of the provisions of the European Convention most frequently resorted to in our courts since the Human Rights Act 1998 came into force. It falls to be considered most often in immigration cases, where the nature of the actual or putative interference with private and family life is plain enough: the claimant complains that if he is removed or deported he will be separated from family members, often a spouse and children, settled in the United Kingdom. In this present case, however, the nature of the claimed interference is more elusive. So is the nature of the private or family life interest which is said to be assaulted. It is useful therefore to have in mind the many facets of the article 8 right acknowledged by the European Court of Human Rights, and—if it can be ascertained—what it is that links them.

17 The leading case of *Von Hannover v Germany* (2004) 40 EHRR 1 concerned the publication of photographs of Princess Caroline of Monaco engaged in various everyday activities such as horse riding, shopping, dining in a restaurant with a companion, on a skiing holiday, leaving her Paris home with her husband and tripping over an obstacle at a private beach club in Monaco. The Strasbourg court held that there had been a violation of article 8, even though all the photographs were taken when the Princess was in a public place except those, taken at long range, when she was at the private beach club. I should cite the following passages from the judgment, at paras 50–53:

"50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture. Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.

"51. The court has also indicated that, in certain circumstances, a person

has a 'legitimate expectation' of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls'.

"52. As regards photos, with a view to defining the scope of the protection afforded by article 8 against arbitrary interference by public authorities, the commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.

"53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life ..."

18 In *S v United Kingdom* (2008) 48 EHRR 1169, the applicants were arrested on suspicion of serious offences and their fingerprints and DNA samples were taken. They were in due course acquitted (or the charge not pressed). They asked for their fingerprints and DNA samples to be destroyed, but in both cases the police refused. They brought judicial review proceedings to challenge the police decision, culminating in an appeal to their Lordships' House, but were unsuccessful. The Strasbourg court said, under the heading "General principles", at paras 66–67:

"66. The court recalls that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v United Kingdom* (2002) 35 EHRR 1, para 61 and *YF v Turkey* (2003) 39 EHRR 715, para 33). It can therefore embrace multiple aspects of the person's physical and social identity (see *Mikuliæ v Croatia* Reports of Judgments and Decisions 2002-I, p 141, para 53) [Also [2002] 1 FCR 720]. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8 (see, among other authorities, *Bensaid v United Kingdom* (2001) 33 EHRR 205, para 47 with further references, and *Peck v United Kingdom* (2003) 36 EHRR 719, para 57). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see mutatis mutandis *Burghartz v Switzerland* (1994) 18 EHRR 101, para 24; and *Ünal Tekeli v Turkey* (2004) 42 EHRR 1185, para 42). Information about the person's health is an important element of private life (see *Z v Finland* (1997) 25 EHRR 371, para 71). The court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular article 6 of the Data Protection Convention quoted in para 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz* , cited above, opinion of the commission, p 37, para 47, and *Friedl v Austria* (1995) 21 EHRR 83, opinion of the commission, p 20, para 45). The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v Italy* (2005) 43 EHRR 400, para 29).

"67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of article 8 (see *Leander v Sweden* (1987) 9 EHRR 433, para 48). The subsequent use of the stored information has no bearing on that finding (*Amann v Switzerland* (2000) 30 EHRR 843, para 69). However, in determining whether the personal

information retained by the authorities involves any of the private-life aspects mentioned above, the court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, mutatis mutandis, *Friedl* , cited above, paras 49–51, and *Peck v United Kingdom* , cited above, para 59)."

19 These and other cases show that the content of the phrase "private and family life" is very broad indeed. Looking only at the words of the article, one might have supposed that the essence of the right was the protection of close personal relationships. While that remains a core instance, and perhaps the paradigm case of the right, the jurisprudence has accepted many other facets; so many that any attempt to encapsulate the right's scope in a single idea can only be undertaken at a level of considerable abstraction. But it is an endeavour worth pursuing, since we need if possible to be armed at least with a sense of direction when it comes to disputed cases at the margin.

20 The phrase "physical and psychological integrity" of a person (the *Von Hannover* case 40 EHRR 1, para 50; *S v United Kingdom* 48 EHRR 1169, para 66) is with respect helpful. So is the person's "physical and social identity": *S v United Kingdom* , para 66 and other references there given). These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual. I claim no originality for this description. In *Murray v Express Newspapers plc* [2009] Ch 481, para 31, Sir Anthony Clarke MR, giving the judgment of the court, referred to Lord Hoffmann's emphasis in *Campbell v MGN Ltd* [2004] 2 AC 457, para 51 upon the fact that

> "the law now focuses upon the protection of human autonomy and dignity—'the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people'."

21 The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (the *Von Hannover* case 40 EHRR 1, para 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.

22 This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly

curtailed by the scope of the justifications available to the state pursuant to article 8(2). I shall say a little in turn about these three antidotes to the overblown use of article 8.

23 As for the first—"a certain level of seriousness"—see for example *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 28, per Lord Bingham of Cornhill:

> "It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level."

24 As for the second—a "reasonable expectation of privacy"—I have already cited para 51 of the *Von Hannover* case 40 EHRR 1, with its reference to that very phrase, and also to a "legitimate expectation" of protection. One may compare a passage in Lord Nicholls of Birkenhead's opinion in the *Campbell* case [2004] 2 AC 45, para 21:

> "Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

In the same case Lord Hope of Craighead said, at para 99: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." In *Murray v Express Newspapers plc* [2009] Ch 481 Sir Anthony Clarke MR referred to both of these passages, and stated, at paras 35–36:

> "35. ... so far as the relevant principles to be derived from *Campbell v MGN Ltd* [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question ...
>
> "36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

25 We can see, then, that while an individual's personal autonomy makes him the master of all those facts about his own identity of which the cases speak, his ownership of them depends by law on there being a reasonable expectation in the particular case that his privacy will be respected. This may operate as a factor limiting the scope of the article 8 right. As I will shortly explain, it is a major dimension of Mr Grodzinski's case on behalf of the defendant commissioner that what happened here took place in a public street, where people may take photographs at any time; there was, he says, no reasonable expectation that the claimant would not be photographed.

26 The third safeguard against too pervasive an application of article 8 consists in the relation between article 8(1) and 8(2). The first two antidotes, a certain level of seriousness and a reasonable expectation of privacy, though clearly important, still allow an open gate to article 8(1) in very many circumstances; but it will often be closed by article 8(2). Once the 8(2) stage is reached, and the court is looking for a justification from the state for what would otherwise amount to a violation, the first question will be whether the action complained of was taken or to be taken in pursuance of a legitimate aim; that is always crucial. If that condition is met, there will be other issues (such as compliance with the requirement of legal certainty). Important for present purposes is the familiar question, whether the action is proportionate to the legitimate aim in whose service it was taken. At that stage, subject always to context and the case's particular subject matter, the court is likely to acknowledge and attribute a margin of discretion to the responsible state. This exercise provides an important contrast with the court's task under 8(1). Its application may amount to a significant restraint upon the bite of article 8.

27 I recognise, of course, that the court's assessment of proportionality will always and necessarily be sensitive to the facts of the particular case, and the scope of the state's margin of discretion must vary according to the importance of the impugned right in the particular instance, the force of the legitimate aim involved, and other balancing factors. The overall point to be made is that while the application of 8(1) and that of 8(2) are logically separate, and the second arises only if the first is fulfilled, there is a symbiosis: article 8(1) is generously applied, but the justifications properly available under 8(2), not least given the margin of discretion which the decision-maker is likely to enjoy, may sometimes cut its application close to the quick.

28 The value of this approach is I think to be understood in light of the important fact that the paradigm case of article 8's application is where the putative violation is by the state itself. It seems to me entirely in harmony with the fair balance which falls to be struck throughout the Convention provisions between the rights of the individual and the interest of the community (see for example *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69) that where state action touches the individual's personal autonomy, it should take little to require the state to justify itself, but equally—if (and I repeat, this is critical) the action complained is taken in good faith to further a legitimate aim—a proper justification may be readily at hand. This is no more than the rule of law in action. Thus the state organ in question, here the police, is subjected by article 8 to proper standards of conduct; but through the margin of discretion recognised in the jurisprudence, the law will allow it proper practical scope to fulfil its public duty.

(2) Article 8(1)—was there a prima facie violation?

29 Against that background I turn to the issues in this appeal. It is useful first to refer to the defendant commissioner's case. Mr Grodzinski on his behalf contends that the actions of the police in taking and retaining the pictures did not touch the claimant's right under article 8: there was no prima facie violation of article 8(1), and therefore nothing for the defendant to justify by reference to any of the considerations set out in article 8(2). In the course of his submissions he drew a distinction between the *taking* of the photographs and the *retention* of the images. His case is that neither involved any prima facie violation of article 8(1). The judge below agreed. Although for reasons I shall explain I consider that this distinction is in the end unhelpful (at least in the present case) for the purpose of ascertaining the reach of the Convention right, it is nevertheless convenient first

to consider whether article 8(1) was engaged by the mere taking of the photographs.

(2a) Is article 8(1) engaged by the mere taking of the photographs?

30 Mr Grodzinski supports his position as regards the taking of the photographs principally by reference to two propositions given by the authorities, one broad, the other narrow. I have already introduced the broad proposition. It recalls that the European Convention is concerned with the protection of fundamental rights and freedoms; and is to the effect that the facts said to constitute an interference with the right guaranteed by article 8 must attain "a certain level of seriousness". This is supported by a wealth of authority; Mr Grodzinski cites *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 28, per Lord Bingham of Cornhill, a passage which I have set out above at para 23.

31 I have also foreshadowed the second, and narrower, proposition advanced by Mr Grodzinski. It is that ordinarily the taking of photographs in a public street involves no element of interference with anyone's private life and therefore will not engage article 8(1), although the later publication of such photographs may be a different matter. Here I should again cite the *Campbell* case [2004] 2 AC 457. The facts in barest outline were that a well-known fashion model was photographed in a public street leaving a narcotic addiction therapy session, and the photographs (or some of them) were later published. The House of Lords was divided as to the outcome of Miss Campbell's privacy/confidence claim, albeit on a very narrow aspect of the case. The force of the following dicta is unaffected by their authors' concurrence in the result or otherwise. Lord Hoffmann said, at paras 73–74:

> "73. In the present case the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent ...
>
> "74. But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large."

Lord Hope of Craighead said, at para 122:

> "The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive ..."

Finally, Baroness Hale of Richmond, at para 154:

> "Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complain."

32 In the present case there was, of course, no question of the photographs

being published. Mr Grodzinski says there are no aspects of the facts that could elevate the case to "a certain level of seriousness": the fact that more than one picture was taken, or that the police followed the claimant down Duke Street, cannot suffice. He submits that in the end this is no more than an instance of photographs being taken in a public street and there can be no article 8 complaint.

33 It is clear that the real vice in the *Campbell* case (and also the *Von Hannover* case 40 EHRR 1 and *Murray v Express Newspapers plc* [2009] Ch 481, which concerned the covert photographing of a well known author, JK Rowling, her husband and young child in a public street in Edinburgh) was the fact or threat of publication in the media, and not just the snapping of the shutter. Can Mr Westgate for the claimant sustain a claim that the mere taking of the pictures, irrespective of the use made of them (a claim he vigorously pursued), engages article 8(1)?

34 I would certainly acknowledge that the circumstances in which a photograph is taken in a public place may of themselves turn the event into one in which article 8 is not merely engaged but grossly violated. The act of taking the picture, or more likely pictures, may be intrusive or even violent, conducted by means of hot pursuit, face-to-face confrontation, pushing, shoving, bright lights, barging into the affected person's home. The subject of the photographers' interest—in the case I am contemplating, there will usually be a bevy of picture-takers—may be seriously harassed and perhaps assaulted. He or she may certainly feel frightened and distressed. Conduct of this kind is simply brutal. It may well attract other remedies, civil or criminal, under our domestic law. It would plainly violate article 8(1), and I can see no public interest justification for it under article 8(2). But scenarios of that kind are very far from this case. I accept Mr Grodzinski's submission that the fact that more than one picture was taken, or that the police followed the claimant down Duke Street, cannot turn this episode into anything remotely so objectionable.

35 The core of Mr Westgate's case is however that it was the police—and thus the state—who took the pictures. As I have stated, at para 28, the paradigm case of article 8's application is where the putative violation is by the state. Can that make all the difference, simply as regards the taking of the photographs and nothing more? In my judgment it cannot. It is no surprise that the *mere taking* of someone's photograph in a public street has been consistently held to be no interference with privacy. The snapping of the shutter of itself breaches no rights, unless something more is added.

36 Accordingly I conclude that the bare act of taking the pictures, by whoever done, is not of itself capable of engaging article 8(1) unless there are aggravating circumstances. I have already referred, at para 34, to the case where the subject of the photographer's attention is harassed and hounded, and perhaps assaulted. As I have said that is plainly not this case. And as for this particular case, I have already rejected (again para 34) the suggestion that the fact that more than one picture was taken, or that the police followed the claimant down Duke Street, could give rise to a prima facie violation of the article. I would add that notwithstanding the claimant's apprehensions, there is in my view every reason to accept Mr Williams's evidence that he was generally at pains "to keep a safe distance from the subject and try not to invade their 'personal space'", for reasons he gives at para 5 of his statement. It is also obvious that the new material I have described, based on Superintendent Hartshorn's interview, cannot advance the case as regards the bare act of taking the pictures.

37 I should note that Mr Westgate also submits, somewhat more generally, that the use of overt photography by the police has actually become an

intimidating feature of London life. He relies on a second witness statement from Mr Gask, an employee of Liberty, for whose introduction in evidence we gave permission at the hearing. Mr Gask gives particulars of three press publications on the subject. One of these (the *Guardian* , 30 May 2008) describes an operation by Essex police involving intensive surveillance of youths (including repeated photography) in a bid to curb anti-social behaviour; an operation which was welcomed by some very muscular observations by the Secretary of State for the Home Department. In my view all this puts the matter far too high. None of Mr Gask's instances suggests, far less demonstrates, that the snapping of the shutter by the police in a public place is capable without more of engaging article 8(1), or that the facts of this case (so far as they concern only the taking of the pictures) do so.

38 The real issue is whether the taking of the pictures, along with their actual and/or apprehended use, might amount to a violation.

(2b) Article 8(1): the taking of the photographs and their use

39 It might be thought that if (as I would hold) the mere taking of the pictures does not engage article 8(1), there follows a wholly separate question: whether their retention and intended use might do so. But I do not think this is the right way to analyse the case. I stated earlier, at para 29, that the supposed distinction between the taking of the photographs and the retention of the images is in the end unhelpful for the purpose of ascertaining the reach of the article 8 right. We have seen that the defendant's policy is that "cameras are deployed overtly ... officers should clearly identify themselves as police officers or police staff and not hide the fact that they are filming". This is certainly as it should be; if it were done covertly, there would be other very substantial arguments to consider which in this case do not arise. As it is, the subject—here, the claimant—observes who is taking his picture and knows it is a police photographer. He is bound to assume that the picture will be kept, and that it will, or at least might, be used for a police purpose. Mr Grodzinski submitted that if the taking of the pictures is not itself any interference with the claimant's article 8(1) right, it cannot become so by reason of the pictures' potential use; but this I think is too simplistic. The subject's complaint—absent any question of intimidation or harassment—is that his image is being recorded by state authorities, an act to which he does not consent, which he believes to be unjustified, and whose precise purpose is unknown to him. The police operation, from the taking of the pictures to their actual and intended retention and use, must in my opinion be judged as a whole. Accordingly I am inclined to agree with Mr Westgate's submission recorded by the judge below as follows [2008] HRLR 817, para 24:

> "It is impossible ... to 'compartmentalise' the taking of the photographs without regard to the circumstances in which they were taken, the purposes of their retention, whether, for example, it is intended thereby to identify the individual and whether there is proper and certain legal control over the photography as a whole. He submits that here the claimant's identity *was* discovered and there was a degree of systematic gathering of information about CAAT activity and its members. He pointed also to evidence from the claimant's solicitor of other occasions when members of CAAT have been similarly photographed."

40 Mr Grodzinski cited two decisions of the Strasbourg commission, *X v United Kingdom* (Application No 5877/72) (unreported) given 12 October 1973 and *Friedl v Austria* (1995) 21 EHRR 83, which I think tend to confirm that (at least in a case about the taking of pictures by the police) we are to look at all the circumstances of the case in order to see whether article 8(1) is engaged. The

facts of the *X* case involved a protest against the apartheid laws in South Africa. The applicant was arrested during a rugby match in England involving the South African national team and was photographed upon arrest and thereafter at the police station. She said that she was told that the photographs would be kept in case she made trouble at future matches. The commission's decision, declaring the claim inadmissible, stated:

> "The commission has noted here the following elements in the case as it has been presented: first, that there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there; secondly, that the photographs related to a public incident in which she was voluntarily taking part; and thirdly, that they were taken solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose. Bearing these factors in mind, the commission finds that the taking and retention of the photographs of the applicant could not be considered to amount to an interference with her private life within the meaning of article 8. An examination by the commission of the applicant's complaint ... shows that the taking of her photographs was part of and solely related to her voluntary public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the two articles just considered."

41 The *Friedl* case 21 EHRR 83 (in which the *X* case was cited) was a case where there had been a demonstration involving a round-the-clock "sit in" of about 50 persons in an underground pedestrian passage in Vienna, held with a view to drawing public attention to the plight of the homeless. The police took photographs and also recorded images on a video cassette for use in the event of a prosecution. The applicant also claimed that he was photographed individually, his identity was checked and his particulars noted down. The commission held the applicant's article 8 claim to be admissible but in the event found there was no violation, stating, at paras 49–51:

> "49. In the present case, the commission has noted the following elements: first, there was no intrusion into the 'inner circle' of the applicant's private life in the sense that the authorities entered his home and took the photographs there; secondly, the photographs related to a public incident, namely a manifestation of several persons in a public place, in which the applicant was voluntarily taking part; and thirdly, they were solely taken for the purposes, on 17 February 1988, of recording the character of the manifestation and the actual situation at the place in question, e g the sanitary conditions, and, on 19 February 1988, of recording the conduct of the participants in the manifestation in view of ensuing investigation proceedings for offences against the road traffic regulations.
>
> "50. In this context, the commission attaches weight to the assurances given by the defendant Government according to which the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.
>
> "51. Bearing these factors in mind, the commission finds that the taking of photographs of the applicant and their retention do not amount to an interference with his right to respect for his private life within the meaning of article 8(1) of the Convention."

42 What, then, of the article 8(1) issue on the facts of the present case? In his

first witness statement the claimant says, at paras 9, 11 and 15–16:

> "9. ... I was ... confused as to why this was happening to me, as I knew I had not done anything wrong ..."
>
> "11. I felt threatened and uncomfortable throughout this. At no point would any of the officers explain why we were being photographed or questioned. It was my unease at this and my knowledge that I had not done anything wrong which meant that I chose not to give them my identity ..."
>
> "15. The knowledge that I have nothing to hide in terms of my own actions does not make this situation any easier for me. Instead it makes me more anxious that the photographs were taken when there did not seem to be any reasonable explanation as to why there was a need to do so.
>
> "16. I feel that I do not know how any information might be used by the police in the future, and that I had no control over the photographs being taken. I feel very uncomfortable that the information might be kept on my file by police indefinitely ..."

43 The claimant has not been cross-examined, and his witness statement has of course been crafted, perfectly properly, by his solicitor. But the essential point being made is clearly right: he found himself being photographed by the police, and he could not and did not know why they were doing it and what use they might make of the pictures. The case is in my judgment quite different from the *X* case, in which the photographs were taken on and after the applicant's arrest, when the police might well have been expected to do just that. It is possibly closer to the *Friedl* case, but in that case there had been a demonstration—a sit-in—where again the taking of police photographs could readily have been expected. In *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 28, which I have cited at para 23, Lord Bingham referred to: "an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports": another instance in which the putative violation of article 8 (if any violation were suggested) consists in something familiar and expected. In cases of that kind, where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to find a prima facie breach of article 8 and call on the state to justify the action taken by reference to article 8(2).

44 I do not of course suggest that there is a rigid class of case in which, once it is shown that the state actions complained of (such as taking photographs) are expected and unsurprising, article 8 cannot be engaged; nor likewise that where they are surprising and unexpected, article 8 will necessarily be applicable. The Strasbourg court has always been sensitive to each case's particular facts, and the particular facts must always be examined. And the first two limiting factors affecting article 8's application—a certain level of seriousness and a reasonable expectation of privacy—are not sharp-edged.

45 But in my judgment it is important to recognise that state action may confront and challenge the individual as it were out of the blue. It may have no patent or obvious contextual explanation, and in that case it is not more apparently rational than arbitrary, nor more apparently justified than unjustified. In this case it consists in the taking and retaining of photographs, though it might consist in other acts. The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of the shutter. The police are a state authority. And as I have said, the claimant could not and did not know why they were doing it and what use they

might make of the pictures.

46 In these circumstances I would hold that article 8 is engaged. On the particular facts the police action, unexplained at the time it happened and carrying as it did the implication that the images would be kept and used, is a sufficient intrusion by the state into the individual's own space, his integrity, as to amount to a prima facie violation of article 8(1). It attains a sufficient level of seriousness and in the circumstances the claimant enjoyed a reasonable expectation that his privacy would not be thus invaded. Moreover I consider with respect that this conclusion is supported by the judgment of the Strasbourg court in *S v United Kingdom* 48 EHRR 1169. It will be recalled that the first sentence of para 67 reads: "The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of article 8 ..." And the court said, at para 121:

> "The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (see para 67 above)."

However the impact of these observations on the present case is I think weakened by the fact that the claimant's image was not placed on the CO11 database, which I have described in dealing with the new material arising from the *Guardian* article, nor on any other database. And I should make clear my view that this new material does not assist the claimant in any respect. The fact that the CO11 database exists cannot conceivably support the claimant's contention that his article 8 rights have been interfered with, since his image was never placed upon it; and he has no proper business advancing any arguments—if this is what he seeks to do—to assault the practice or procedure of the defendant (as regards the storage and use of information) in circumstances where any such arguments cannot actually bear on his claim.

47 In arriving at this conclusion on the application of article 8(1) I intend no criticism of the police. Their action's merits will be for consideration under article 8(2). Their subjection to the discipline of article 8 means that the fair balance which falls to be struck throughout the Convention provisions between the rights of the individual and the interest of the community has to be struck on the facts of this case. That I think is as it should be.

(3) Article 8(2)

48 First, it seems to me that there can be no question but that the taking and retention of photographs of the claimant on 27 April 2005 were in pursuit of a legitimate aim. As I have stated, at para 4, the pictures were taken (1) so that if disorder erupted and offences were committed (or it transpired that offences had already been committed inside the hotel), offenders could be identified, albeit at a later time if necessary; and (2) so that persons who might possibly commit public order offences at the DESi fair in September could be identified in advance: this would or might assist the police operation at the forthcoming event. In article 8(2) terms, the action was taken "for the prevention of disorder or crime"; perhaps also "in the interests of ... public safety or ... for the protection of the rights and freedoms of others". So much is not I think disputed.

49 Mr Westgate's argument on this part of the case is twofold. He submits first that the police action was not "in accordance with the law", because any putative

legal justification for it (certainly for the retention and use of the pictures) is not sufficiently clear and precise. Secondly he says that the police action was disproportionate to the legitimate aim in view.

(3a) "In accordance with the law"

50 Mr Grodzinski submits that the taking and retention of the photographs was done pursuant to the defendant's common law powers to detect and prevent crime. He cites *Rice v Connolly* [1966] 2 QB 414, 419, per Lord Parker CJ: with respect I need not set out the passage. As regards the requirements of clarity and certainty, Mr Grodzinski relied on the striking decision of the Strasbourg court in *Murray v United Kingdom* (1994) 19 EHRR 193. In that case the first applicant was arrested and detained under the Northern Ireland (Emergency Provisions) Act 1978. She was suspected of collecting money for the purchase of arms for the Irish Republican Army. At an army screening centre she refused to answer questions, was photographed without her knowledge and consent and the photographs were kept on record along with personal details about her, her family and her home. She was later released without charge. The Strasbourg court (17 judges: the equivalent of today's Grand Chamber) roundly stated, at para 88:

> "The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under common law. The impugned measures thus had a basis in domestic law. The court discerns no reason, on the material before it, for not concluding that each of the various measures was 'in accordance with the law', within the meaning of article 8(2)."

51 McCombe J had this to say [2008] HRLR 817, paras 69–70:

> "69. Mr Westgate submitted that the decision in *Murray v United Kingdom* (1994) 19 EHRR 193 was 'wrong'. He was prepared to accept that *Rice v Connolly* [1966] 2 QB 414 might provide the outline of a legal basis for what was done here and prevents the conduct in issue from being actionable in tort, but it does not address the recognised requirements of accessibility, certainty and precision now recognised in European jurisprudence. In answer, Mr Grodzinski submitted that the decision in the *Murray* case was that of the full court and post-dated *Malone v United Kingdom* (1984) 7 EHRR 14; *Silver v United Kingdom* (1983) 5 EHRR 347 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245 in which the principles of precision, certainty and accessibility were fully considered; it was inconceivable, it was submitted, that the court would not have had those principles well in mind.
>
> "70. I recognise that the European court in the *Malone* case stated (at para 68 of its judgment, 7 EHRR 14, p 41) that the degree of precision required of the law will depend on the subject matter and, on any footing, any interference with the claimant's rights under article 8 must, in my view, be no more than modest. In the circumstances, it appears that the common law power relied upon by the defendant must, in the circumstances of this case, be sufficiently in accordance with the law to satisfy article 8(2). Further, as the defendant rightly submits, the exercise of that power is subject to public law control reaching over and above the inherent 'lawfulness' of the actions. In addition, I cannot accept that it is my place simply to dismiss the decision of the full court in the *Murray* case as 'wrong', as Mr Westgate would have me do. That would do quite inadequate respect for the decisions of that court, the ultimate arbiter of these matters, in a case in close proximity of subject matter to the present one."

52 It appears that on seeing a draft of the judgment Mr Westgate disavowed

having made so stark a submission; but the judge indicates (footnote 8 to the judgment) that para 69 accurately records his note of the argument. In his skeleton argument for this appeal Mr Westgate submits, at para 39, that

> " *Murray v United Kingdom* 19 EHRR 193 dealt only with the source of the power to take photographs and not with the other established requirements that the law be sufficiently precise, certain and accessible,"

and refers to *Malone v United Kingdom* (1984) 7 EHRR 14 and *Silver v United Kingdom* (1983) 5 EHRR 347. However it is to be noted, as Mr Grodzinski pointed out (skeleton argument para 74), that the court in the *Murray* case 19 EHRR 193 upheld the earlier decision of the commission, which had referred expressly (p 216, para 80) to the *Malone* case 7 EHRR 14.

53 It seems to me that the judge's reasoning is correct. I would attach particular importance to the nature of the intrusion said to violate article 8. There is some suggestion in the cases of a relativist approach, so that the more intrusive the act complained of, the more precise and specific must be the law said to justify it. Thus in the *Gillan* case [2004] 2 AC 307, to which I have already referred, Lord Hope of Craighead said, at para 56:

> "As the concluding words of para 67 of the decision in *Malone v United Kingdom* 7 EHRR 14 indicate, the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen's Convention rights which is likely to result from the exercise of the power that has been given to the public authority. The things that a constable can do when exercising the section 44 [of the Terrorism Act 2000] power are limited by the provisions of section 45(3) and 45(4). He may not require the person to remove any clothing in public except that which is specified, and the person may be detained only for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle has been stopped. The extent of the intrusion is not very great given the obvious importance of the purpose for which it is being resorted to. In my opinion the structure of law within which it is to be exercised is sufficient in all the circumstances to meet the requirement of legality."

The *Malone* case 7 EHRR 14 concerned telephone intercepts. As McCombe J observed [2008] HRLR 817, para 70, the Strasbourg court in that case stated 7 EHRR 14, para 68, that the degree of precision required of the law will depend on the subject matter. The previous paragraph, referred to by Lord Hope in the *Gillan* case [2004] 2 AC 307, has this 7 EHRR 14, para 67:

> "Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence."

It is also interesting to note this observation by the Strasbourg court in *S v United Kingdom* 48 EHRR 1169, para 96:

> "The level of precision required of domestic legislation—which cannot in any

case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339, para 84)."

54 In the present case, though for reasons I have given the article 8(1) threshold is crossed, the nature of the defendant's interference with the claimant's private life was, as the judge observed, no more than modest. In those circumstances the requirement of legality is in my judgment satisfied by the general common law power referred to in *Murray v Express Newspapers plc* [2009] Ch 481, and the judge was right so to hold.

55 There were some other points on this part of the case. Mr Westgate relied on the defendant's failure to disclose the "Standard operating procedures for 'Use of overt filming/photography'", to which I referred at para 13. I should in fairness note that this document has been withheld, as I understand it, on grounds permitted under the Freedom of Information Act 2000. The defendant says that throws no light on the circumstances in which police photographs may be taken. In any event, however, the defendant in my judgment does not need to rely on the terms of his policy, or any established internal procedures relating to overt photography, in order to establish compliance with the requirement of legality. The common law power suffices. For the same reason I do not find it necessary to enter into the further debate between the parties as to whether the legality requirement might be met by the provisions of the Data Protection Act 1998. Likewise, the new material arising out of the *Guardian* article does not affect the matter.

(3b) Proportionality

56 McCombe J dealt with this aspect very shortly. He considered [2008] HRLR 817, para 74, that

"it was entirely reasonable and proportionate for the police to photograph persons who, as it might turn out, had been engaged or might be likely to engage in criminal disorder."

Ironically, as it has turned out, he relied on some observations of Lord Steyn in the House of Lords in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 1:

"My Lords, it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries. Thus in the 1990s closed circuit television ('CCTV') became a crime-prevention strategy extensively adopted in British cities and towns. The images recorded facilitate the detection of crime and prosecution of offenders. Making due allowance for the possibility of threats to civil liberties, this phenomenon has had beneficial effects."

57 As I have indicated their Lordships' House considered that the retention of the applicants' DNA and fingerprints did not offend their rights under article 8. The Strasbourg court took a very different view. They held in *S v United Kingdom* 48 EHRR 1169, paras 117–119, 125:

"117. While neither the statistics nor the examples provided by the Government in themselves establish that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate retention of the fingerprint and DNA records of all persons

in the applicants' position, the court accepts that the extension of the database has none the less contributed to the detection and prevention of crime.

"118. The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests.

"119. In this respect, the court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken—and retained—from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed ... in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

"125. In conclusion, the court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the defendant state has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data."

58 Plainly there might be a question whether this court should follow the House of Lords or the European Court of Human Rights in *S v United Kingdom* . If this court were required to confront such a question, it would follow the House of Lords: *Kay v Lambeth London Borough Council* [2006] 2 AC 465. But in my judgment *S v United Kingdom* 48 EHRR 1169 is wholly distinguishable on its facts. Pictures of the claimant were taken because the police believed that he had contact with EA who had a history of unlawful activity, and there was the possibility that he had been involved in unlawful activity in the meeting from which EA had been ejected. The taking of the pictures was in no sense aggressively done. The retention of the pictures was carefully and tightly controlled. The claimant's image was not placed on any searchable database, far less a nationwide database indefinitely retained. But for the commencement of these proceedings the images of the claimant would have been destroyed after the DSEi exhibition.

59 In my judgment no useful comparison can be made between the facts of this case and the features of *S v United Kingdom* which led the Strasbourg court to reject the state's article 8(2) justification. There is a qualitative difference between photographic images on the one hand and fingerprints and DNA on the other, not least as regards the reach of the use to which they might be put. The claimant's photograph was in my judgment taken, and retained, in the course of a properly controlled operation undertaken for perfectly good policing reasons

consistently with a balanced and reasonable published policy.

60 I acknowledge that any link between the claimant and EA is disputed; that the claimant is a person of good character; that any suspicion that the claimant might have committed an offence at or in connection with the annual general meeting must have been quickly dissipated; and that the only justification for keeping the images thereafter was to monitor his conduct at the DSEi fair several months later. But that was a legitimate aim, in service of which the images were kept. For my part I find it impossible to categorise what was done as outwith the margin of operational discretion which, it must surely be acknowledged, the police possess in such circumstances. In my judgment the retention of the images was proportionate to the legitimate aim of the exercise.

Articles 10, 11 and 14

61 I hope it will not be thought discourteous to Mr Westgate if I deal with these further complaints summarily. I consider it fanciful to suppose that in the events which happened there was any interference with the claimant's rights under article 10 and 11. Apart from anything else he was not purporting to exercise either such right on the occasion in question.

62 As for article 14, the police had good reason, arising from their perception of events which was itself reasonable, to photograph the claimant. There was no discrimination contrary to article 14.

Conclusion

63 I would dismiss the appeal.

DYSON LJ

64 I gratefully adopt the account of the facts and issues set out so fully by Laws LJ. I agree with his valuable analysis of the article 8(1) issue and his reasons for concluding that article 8 is engaged on the facts of this case. For the reasons that follow, however, I have reached a different conclusion on the article 8(2) issue. Before I explain why in my judgment the interference with the claimant's article 8 rights was disproportionate, I need to emphasise some of the relevant facts. I regret that this will inevitably involve some repetition of the account already given by Laws LJ.

The relevant facts

65 Chief Inspector Weaver was operations chief inspector at West End Central police station at the material time. The police had been informed that there might be some form of protest by members of CAAT at the annual general meeting of Reed on 27 April 2005. A second demonstration was due to take place on the same day outside the premises of British Petroleum by an environmental campaigning group and Chief Inspector Weaver was concerned that the two protest groups might combine and exacerbate the problem. Her concerns that there might be trouble at the annual general meeting were further increased when it became known that a named individual (EA), who had a history of unlawful demonstrations against companies involved in the arms trade and who had a number of previous convictions for offences in this context, had been nominated as a proxy to vote at the annual general meeting. It was these concerns which led Chief Inspector Weaver to decide that the annual general meeting had to be policed: see paras 4–6 of her witness statement.

66 Twenty four officers were allocated to the policing of the event. In addition, intelligence gathering officers were deployed. The purpose of the intelligence gathering teams was to "gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed or disorder break out": para 10 of Chief Inspector Weaver's statement.

67 She says, at para 13:

> "The reason why I decided to request the use [of] FITs and EGs was because of the ongoing nature of the protests against companies involved in the arms trade and the attendance of known trouble makers so that I believed that public disorder may result. In such situations it is vital that the police know who has attended and what their involvement is."

68 And again at para 15:

> "Intelligence had to be gathered at the time so that, should disorder result or offences subsequently come to light, those guilty of an offence could be identified so that they could be arrested, if not at the time then in the future. Thus if those attending the annual general meeting caused trouble they could be identified and either arrested at the time or if appropriate, shortly after. Further, I took the view that if those individuals who might attend and commit public order or other offences at the DSEi fair in September could be identified in advance, by ascertaining their identity at the Reed annual general meeting, that would help to police the DSEi event and deal with any such offences."

69 Police Sergeant Dixon was an officer in one of the intelligence gathering teams on 27 April. In his statement, he says, at para 5, that of particular interest to the team were two activists (EA and RH) both of whom had a history of violent protests and who, it was believed, had a tendency to encourage otherwise peaceful protesters to commit offences.

70 The annual general meeting was conducted peacefully, although EA and RH were ejected by private security officials for disrupting the meeting. The claimant left the hotel after the conclusion of the annual general meeting at about 12.30 p m with another man (IP). They stopped to speak to KB and were joined by EA. It was in these circumstances (i e because the claimant and IP were seen associating with EA) that Police Sergeant Dixon says that he directed the photographer to take the photographs which have given rise to these proceedings. Police Sergeant Dixon says at para 10 of his statement:

> "The decision to take the photographs of the claimant and IP was not solely because of their association with EA but also because the photographs could be of subsequent evidential value if any, as yet undiscovered, offences had been committed inside the hotel. Such offences are not always immediately apparent and may have become known only after the meeting was over."

71 The evidence as to the extent of the association between EA and the claimant is as follows. The claimant has no recollection of being joined by or seeing EA after the annual general meeting. IP says that he and the claimant had a "brief chat" with EA lasting about one minute before they dispersed. Police Sergeant Dixon says that the group comprising the claimant, IP and KB was joined by EA, but he does not say how long they stayed together. Neal Williams, the photographer, says that at about 12.44 p m, the two females who had been ejected from the meeting joined other protesters outside the hotel and that was when he was asked to take the photographs. He does not say how long the two females remained with the claimant.

72 The only other evidence to which I should refer is that the claimant is a man of good character with no previous convictions. Some time after 27 April (on a date which has not been disclosed), the police discovered his identity. This they did by discovering the names of the new shareholders in Reed and working out by a process of elimination that the person photographed in the company of IP and others was the claimant.

73 A number of points need to be emphasised. First, the only evidence of a

link between the claimant and EA is the brief association between them when the claimant was speaking to IP and they were joined by EA for about one minute. There is no evidence that the claimant went to the meeting with EA or that after he had been photographed outside the hotel, he was accompanied by her as he went along Duke Street and into Bond Street underground station.

74 Secondly, the principal reason why Chief Inspector Weaver involved the intelligence gathering teams was her concern that there might be disorder and criminal conduct at the annual general meeting and/or in the vicinity of the hotel. Moreover, the reason why Police Sergeant Dixon requested photographs to be taken of the claimant (and IP) was because of their association with EA and because such photographs could be of evidential value if it transpired that offences had been committed inside the hotel. Chief Inspector Weaver did, however, also see advantage in gathering evidence which would enable those who might attend the DSEi fair in September to be identified as well. The possible use of the photographs to identify persons who attended the DSEi fair does not, however, seem to have been a factor which led to the decision of Police Sergeant Dixon to require the photographs to be taken.

75 Thirdly, it was acknowledged by Chief Inspector Weaver (and as is obvious), that if any offences had been committed in the hotel, this would have become apparent shortly after the conclusion of the annual general meeting.

76 Fourthly, although it is not clear when the police first became aware that the claimant was a man of good character, they did know on 27 April that, unlike EA and RH, he had not been ejected from the meeting and that he was not guilty of any misconduct outside the hotel; and they must have known within a few days of 27 April (at the latest) that there was no evidence that he had been guilty of any misconduct inside the hotel either.

77 It follows that, within at most a few days of the conclusion of the meeting, there could no longer be any justification for retaining the photographs as evidence of the identity of a person who might have committed an offence at the meeting. The justification for retaining the photographs thereafter must have been as evidence of the identity of a person who might attend the DSEi fair several months later and who might commit an offence at that meeting.

78 It is against this background that it is necessary to consider whether the interference with the claimant's article 8 right to a private life constituted by the taking and retaining of the photographs was justified pursuant to article 8(2).

Article 8(2)

Legitimate aim

79 I agree with Laws LJ that the taking and retention of the photographs were in pursuit of a legitimate aim, namely "for the prevention of disorder or crime" or "for the protection of the rights and freedoms of others": article 8(2). The phrase "prevention of disorder or crime" includes the detection of disorder or crime: see, for example, *S v United Kingdom* 48 EHRR 1169. The contrary was not argued by Mr Westgate.

"In accordance with the law"

80 The next question is whether the interference with the claimant's article 8 rights was "in accordance with the law". In view of the conclusion that I have reached on the issue of proportionality, I do not find it necessary to express a view on this question. I do, however, wish to express one reservation about Laws LJ's analysis.

81 At para 53, Laws LJ attaches particular importance to the nature of the intrusion said to violate article 8 and suggests that, broadly, the more intrusive

the act complained of, the more precise and specific must be the law said to justify it. I would merely say that I have some doubt as to whether para 56 of the speech of Lord Hope of Craighead in *Gillan's* case [2006] 2 AC 307 supports such a proposition or that, if it does, it is supported by the concluding words of para 67 of the decision in *Malone v United Kingdom* 7 EHRR 14. In any event, I see no support for this proposition in the speech of Lord Bingham of Cornhill in *Gillan's* case [2006] 2 AC 307. It is to be noted that all the other members of their Lordships' House (including Lord Hope himself) agreed with the reasoning of Lord Bingham.

"Necessary in a democratic society": proportionality

82 The phrase "necessary in a democratic society" has been considered and applied by the European Court of Human Rights on many occasions. In *S v United Kingdom* 48 EHRR 1169 the court said, at para 101:

> "An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'."

83 In deciding whether the interference is necessary, the court must have regard to the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference: see *S v United Kingdom* , at para 102. At para 103, the court went on to say that the protection of personal data is of fundamental importance to a person's enjoyment of his or her article 8 rights and the domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of article 8. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes.

84 In other words, the court is required to carry out a careful exercise of weighing the legitimate aim to be pursued, the importance of the right which is the subject of the interference and the extent of the interference. Thus an interference whose object is to protect the community from the danger of terrorism is more readily justified as proportionate than an interference whose object is to protect the community from the risk of low level crime and disorder. The importance of the former was emphasised by the House of Lords in *Gillan's* case [2006] 2 AC 307: see per Lord Bingham of Cornhill, at para 29, and Lord Scott of Foscote, at para 62.

85 I agree that *S v United Kingdom* 48 EHRR 1169 is wholly distinguishable on the facts. Whether an interference with a Convention right is proportionate is a fact-sensitive question. I accept that the retention of the photographs by the police was not an interference of the utmost gravity with the claimant's article 8 rights. Nor, however, should it be dismissed as of little consequence. The retention by the police of photographs taken of persons who have not committed an offence, and who are not even suspected of having committed an offence, is always a serious matter. I say this notwithstanding the fact that I accept that the retention of the photographs in this case was tightly controlled and that there is a qualitative difference between photographic images on the one hand and fingerprints and DNA on the other. It should also be recorded that the evidence is that, had these proceedings not been commenced, the photographs would have been destroyed after the DSEi fair. That is because the claimant did not attend that event and there was no intelligence suggesting that he had prior to that event (and after the annual general meeting) participate in any other unlawful activities: see para 13 of the statement of Superintendent Gomm.

86 The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person's rights is, as in the present case, in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger of terrorism or really serious criminal activity.

87 I return to the facts of this case. Within a few days of the annual general meeting the retention of the photographs could not rationally be justified as furthering the aim of detecting the perpetrators of any crime that may have been committed during the meeting. There was no realistic possibility that evidence that a crime had been committed at the meeting would only be obtained weeks or months after the event. The meeting was well attended. There were Reed officers and private security officials present who were on the lookout for troublemakers and who did indeed eject two of them (although there is no evidence that even they committed any offence). I repeat that the principal object of the evidence-gathering operation was to obtain evidence about possible disorder and criminal conduct at the annual general meeting and/or in the vicinity of the hotel and the sole reason given by the officer who instructed the photographer to take the photographs was to obtain evidence which would be of value if offences had been committed at the annual general meeting.

88 The fact that the claimant had been seen briefly in the company of EA after the annual general meeting may have provided further justification for retaining the photographs for a few days after 27 April. But thereafter, in my judgment, neither the brief association with EA nor anything else relating to the annual general meeting provided any justification for retaining the photographs any longer.

89 It follows that the only justification advanced by the police for retaining the photographs for more than a few days after the meeting was the possibility that the claimant might attend and commit an offence at the DSEi fair several months later. But in my judgment, even if due allowance is made for the margin of operational discretion, that justification does not bear scrutiny. First, the DSEi fair was not the principal focus of the evidence-gathering operation. The principal concern of the police was what might happen at the annual general meeting and/or in the vicinity of the hotel. But for that concern, the evidence would suggest that the operation would not have taken place in the first place. Secondly, the sole reason why the photographs were taken was to obtain evidence in case an offence had been committed at the annual general meeting. Thirdly, once it had become clear that, notwithstanding his brief association with EA, the claimant had not committed any offence at the annual general meeting, there was no reasonable basis for fearing that, even if he went to the DSEi fair, he might commit an offence there. His behaviour on 27 April was beyond reproach, even though he was subjected to what he considered to be an intimidating experience. There was no more likelihood that the claimant would commit an offence if he went to the fair than that any other citizen of good character who happened to go to the fair would commit an offence there.

90 It is for the police to justify as proportionate the interference with the claimant's article 8 rights. For the reasons that I have given, I am of the opinion that they have failed to do so. I would allow this appeal.

LORD COLLINS OF MAPESBURY

91 I agree with Dyson LJ that the appeal should be allowed. Plainly the court must not be quick to second guess, or interfere with, operational decisions of the police force. All that in fact happened at the annual general meeting of Reed

Elsevier plc on 27 April 2005 was that two people, EA (who had a criminal record of unlawful activity against organisations in the defence industry) and RH, were ejected by private security staff after chanting slogans, without any suggestion of any involvement in criminal activity. There was a very substantial police presence. It consisted of a chief inspector, three sergeants, 21 constables, five officers in forward intelligence teams, and three officers in an evidence gathering team (together with a civilian photographer in uniform). With the benefit of hindsight, of course, the deployment of 33 police officers and a photographer in uniform was not necessary.

92 When I first read the papers on this appeal, I was struck by the chilling effect on the exercise of lawful rights such a deployment would have. I was also disturbed by the fact that notwithstanding that the police had no reason to believe that any unlawful activity had taken place, and still less that Mr Wood had taken part in any such activity, when he (with Mr Prichard) walked from the hotel in Grosvenor Square where the meeting had taken place towards Bond Street underground station via Duke Street he was followed by a police car, and then questioned about his identity by four police officers, two of whom then followed him on foot and tried to obtain the assistance of station staff to ascertain Mr Wood's identity from his travel card.

93 The reason for the police presence was that demonstrators against the arms trade might try to disrupt the annual general meeting. The purpose of the evidence gathering team with the photographer was "to gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed or disorder break out": Chief Inspector Weaver, para 10. Chief Inspector Weaver decided to use the evidence gathering team because public disorder might break out, and it was therefore vital that the police knew who had attended and what their involvement was: para 13. Intelligence had to be gathered at the time, so that, should disorder result or offences subsequently come to light, those guilty of an offence could be identified: para 15. She also added that she:

> "took the view that if those individuals who might attend and commit public order or other offences at the DSEi [Defence Systems and Equipment International] fair in September could be identified in advance, by ascertaining their identity at the Reed annual general meeting, that would help to police the DSEi event and deal with any such offences."

94 Police Sergeant Dixon headed the evidence gathering team. Chief Inspector Weaver told him that one of her fears was that once inside the hotel demonstrators might commit acts which would only subsequently come to light. EA was of specific interest to the evidence gathering team, and the decision to take the photographs was "not solely because of their association with EA but also because the photographs could be of subsequent evidential value if any, as yet undiscovered, offences had been committed inside the hotel": Police Sergeant Dixon, para 10. Police Sergeant Dixon says that such offences are not always immediately apparent and may become known only after a meeting is over. But unless there was absolutely no communication between Reed Elsevier's staff or security officers and the police, I do not find it easy to imagine what undiscovered offences might have been committed.

95 There is conflicting evidence on whether Mr Wood and EA were together in Grosvenor Square after the meeting. But what is not in doubt is that Mr Wood is a person of good character with no previous convictions; and that the police had no reason to believe that he had taken any part in unlawful activities at the annual general meeting, or indeed been guilty of any misconduct at all. To the extent

that the photographs were taken in case any unlawful activity inside the hotel were subsequently to come to light, it would have been apparent very soon after the meeting (as Dyson LJ says, within a few days at most) that no criminal offences had been committed.

96 I agree with Laws and Dyson LJJ that article 8(1) was engaged, but that the taking and retention of the photographs were in pursuance of a legitimate aim, namely "for the prevention of disorder or crime" or "for the protection of the rights and freedoms of others" for the purposes of article 8(2).

97 But I agree with Dyson LJ that the interference was not proportionate. He has referred to the crucial facts, of which it seems to me that the following are the most important. First, the main object of the evidence gathering operation was to obtain evidence about possible disorder and criminal conduct at the annual general meeting and/or in the vicinity of the hotel, and the sole reason given by Police Sergeant Dixon who instructed the photographer to take the photographs was to obtain evidence which would be of value if offences had been committed at the annual general meeting. Second, the retention of the photographs for more than a few days could not be justified as furthering the aim of detecting the perpetrators of any crime that may have been committed during the meeting. Third, a possible brief association between Mr Wood and EA on the day did not provide any justification for a lengthy retention of the photographs. Fourth, the suggestion that retention of the photographs was justified by the possibility that Mr Wood might attend and commit an offence at the DSEi fair several months later is plainly an afterthought and had nothing to do with the decision to take the photographs.

98 Like Dyson LJ, I prefer to express no concluded view on the question whether the interference was "in accordance with the law". In many cases the European Court of Human Rights has said that not only must the impugned act have some basis in domestic law, but also that it should be compatible with the rule of law and be accessible to the person concerned who must be able to foresee its consequences for him: for recent examples see, e g *Liberty v United Kingdom* (2008) 48 EHRR 1; *S v United Kingdom* 48 EHRR 1169; *Iordachi v Moldova* (Application No 25198/02) (unreported) given 10 February 2009. The taking of the photographs in the present case was lawful at common law, and there is nothing to prevent their retention. There is a published policy by the Metropolitan Police on the use of overt filming and photography, but not on the retention of photographs.

99 As Laws LJ says, there is a striking decision of the full court of the European Court of Human Rights in *Murray v United Kingdom* (1994) 19 EHRR 193. That case concerned the right of the army in Northern Ireland to take and retain photographs of a person who was being questioned at an army screening centre on suspicion of being involved in the collection of money for IRA arms purchases. The court noted, at para 40, that the common law rule entitling the army "to take a photograph equally provides the basis for its retention" and said, at para 88:

> "The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under the common law."

The court concluded, at para 88:

> "The impugned measures thus had a basis in domestic law. The court discerns no reason, on the material before it, for not concluding that each of the various measures was 'in accordance with the law', within the meaning of

article 8(2)."

100 Nevertheless, it is plain that the last word has yet to be said on the implications for civil liberties of the taking and retention of images in the modern surveillance society. This is not the case for the exploration of the wider, and very serious, human rights issues which arise when the state obtains and retains the images of persons who have committed no offence and are not suspected of having committed any offence.

Appeal allowed with costs.
Declaration accordingly.

J C B

Footnotes

1 Human Rights Act 1998, Sch 1, Pt I, art 8: see post, para 14 .

[2013] 2 WLR 141
Kinloch v HM Advocate (SC(Sc))
Supreme Court
Kinloch *v* HM Advocate
[2012] UKSC 62

2012 Nov 26;

Dec

19

Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Mance, Lord Kerr of Tonaghmore, Lord Reed JJSC

Devolution — Scotland — "Devolution issue" — Police using unauthorised surveillance to observe and record appellant in public places engaged in criminal activities — Whether infringing Convention right to respect for private life — Whether actions of police capable of giving rise to devolution issue — Scotland Act 1998 (c 46), ss 44 (1), 57(2), Sch 6, para 1(d) (as amended by Scotland Act 2012 (c 11), s 12(2) and Treaty of Lisbon (Change in Terminology) Order 2011 (SI 2011/1043), arts 3, 6) — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8

Devolution — Scotland — Human rights — Police using unauthorised surveillance to observe and record appellant in public places engaged in criminal activities — Evidence of observations led at trial — Whether breach of Convention right to respect for private life — Whether leading of evidence compatible with Convention right to fair trial — Scotland Act 1998, ss 44(1), 57(2), Sch 6, para 1(d) (as amended by Scotland Act 2012, s 12(2) and Treaty of Lisbon (Change in Terminology) Order 2011, arts 3, 6) — Human Rights Act 1998, Sch 1, Pt I, arts 6, 8

Police officers, carrying out surveillance on the appellant and his associates, observed him in various public places at a number of locations, leaving premises, entering cars and carrying a bag which, when he was searched, was found to contain large sums of money. He was indicted for trial in the sheriff court on charges of converting and transferring criminal property consisting of large sums of money in contravention of sections 327(1) and 329(1) of the Proceeds of Crime Act 2002. At a diet held prior to the trial the appellant took a preliminary plea, expressed to be raised as a devolution minute under Schedule 6 to the Scotland Act 1998, as amended, that the police had acted unlawfully in failing to obtain authorisation for the surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000, that the subsequent actions taken by the officers had been the result of those unlawful acts and that, as a consequence, evidence of their surveillance and of the items seized was inadmissible at trial. The Crown conceded that no authorisation had been given under the 2000 Act. The minute referred to the appellant's right to respect for his private life, protected by article 8.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms1, and to the requirement that, to be justified under article 8.2, any interference with that right had to be in accordance with the law. The sheriff, holding himself bound by an earlier decision of the High Court of Justiciary to the effect that surveillance conducted under an invalid authorisation did not infringe article 8 and that the leading of evidence derived from such surveillance was not incompatible with article 6, refused the minute and leave to appeal. The appellant was convicted following a trial before a different sheriff at which the Crown led evidence of the police observations. The appellant sought leave to appeal against conviction and the refusal of the minute on the ground, inter alia, that the earlier authority was erroneous. At the first sift the judge, refusing leave in respect of both issues, held that, since there was no adequate basis for such a challenge, the sheriff had been entitled to refuse both the minute and leave to appeal. The panel at a second sift also refused leave to appeal. However, on the appellant's motion, which was not opposed by the Lord Advocate on the question of jurisdiction, the High Court of Justiciary Appeal Court granted leave to appeal to the Supreme Court without giving reasons for its decision. On the hearing of the appeal before the Supreme

Court the first issue was stated to be whether the observations by the police, not having been authorised under the 2000 Act, breached the appellant's rights under article 8.1. The appellant raised a second issue, without notice and opposed by the Lord Advocate, that if there had been such a breach, the question also arose whether the act of leading the evidence derived from that surveillance was incompatible with his rights under article 8.1 and, separately, article 6.1 and thus ultra vires in terms of section 57(2) of the Scotland Act 1998, as amended.

On the appeal and on the question whether, having regard to sections 44(1) and 57 (2) of and paragraph 1(d) of Schedule 6 to the Scotland Act 19982, as amended, the devolution minute was incompetent—

Held , (1) that the only type of devolution issue relevant to the appellant's case was that set out in paragragh 1(d) of Schedule 6 to the Scotland Act 1998, as amended, viz whether a purported or proposed exercise of a function by a member of the Scottish Government was incompatible with any of the Convention rights or with EU law; that, although by section 6(1) of the Human Rights Act 1998 it was unlawful for the police, as a public authority, to act incompatibly with a Convention right, since they were not members of the Scottish Government within the meaning of sections 44(1) and 57(2) of the Scotland Act 1998, as amended, the question whether they had acted incompatibly with a Convention right was not a devolution issue within the meaning of paragraph 1 (d); that the question as raised in the minute therefore could not be determined under the Supreme Court's devolution jurisdiction and the court had no jurisdiction otherwise in respect of criminal matters determined by the High Court of Justiciary; but that since the Crown had not opposed the appellant's motion for leave to appeal on a point of jurisdiction, the Appeal Court had considered that it should grant leave and the appellant's real purpose was to challenge the correctness of the decision that the evidence led by the Lord Advocate was admissible, the appeal should be permitted to proceed (post, paras 11 , 13 , 14).

(2) Dismissing the appeal, that since the functions of the police and the Lord Advocate were constitutionally separate and since any interference with the appellant's article 8 right to respect for his private life committed in the course of obtaining the evidence were due to the former and not to the latter, the leading of the evidence by the Lord Advocate did not itself involve any breach of article 8; that the leading of the evidence would not have been incompatible with the appellant's article 6 rights unless the actions of the police had breached article 8, although even if there had been such a breach of article 8 it would not necessarily follow that leading the evidence would have been incompatible with article 6; that, having regard to the jurisprudence of the European Court of Human Rights, whether there had been interference with the right protected by article 8.1 would depend on the facts and circumstances of the individual case; that private life was a broad term which was not susceptible to exhaustive definition; that the extent of the particular intrusion into an individual's private space and the use made of any evidence resulting from it were relevant factors in determining whether there had been such an interference; that measures effected in a public place, outside an individual's home or premises, and occasions where a person knowingly or intentionally engaged in activities which might be recorded in public in circumstances where he did not have a reasonable expectation of privacy, would not, without more, amount to such an interference; that whether the police surveillance conducted in respect of the appellant amounted to an infringement of his right depended on whether he had a reasonable expectation of privacy while he was in public view and engaged in activities in places which were open to the public; that, since (i) there was no suggestion that he could reasonably have had such an expectation, (ii) he had been involved in activities in places where he had been open to other members of the public, (iii) he had taken the risk of being seen and of his movements being recorded and (iv) the criminal nature of any activity in which he was engaged was not an aspect of his private life which he was entitled to keep private, the police actions had not infringed his article 8 rights; and that, accordingly, both issues would be answered in the negative (post, paras 15 , 16 , 17 , 18 –19 , 21 –23).

McGibbon v HM Advocate 2004 JC 60 and *Gilchrist v HM Advocate* 2005 1 JC 34

approved.

PG v United Kingdom (2001) 46 EHRR 1272 applied.

Decision of the High Court of Justiciary reversed.

The following cases are referred to in the judgment of Lord Hope of Craighead DPSC:

Advocate (HM) v P [2011] UKSC 44; 2012SC (UKSC) 108, SC(Sc)

Amann v Switzerland (2000) 30 EHRR 843

Bykov v Russia (Application No 4378/02) (unreported) 10 March 2009, GC

Follen v HM Advocate [2001] UKPC D2; [2001] 1 WLR 1668; 2001SC (PC) 105, PC

Gilchrist v HM Advocate 20051 JC 34; 2004SLT 1167

Hoekstra v HM Advocate [2001] 1 AC 216; [2000] 3 WLR 1817; 2001SC (PC) 37, PC

Khan v United Kingdom (2000) 31 EHRR 1016

Lawrie v Muir 1950JC 19

McGibbon v HM Advocate 2004JC 60

Malone v United Kingdom (1984) 7 EHRR 14

PG v United Kingdom (2001) 46 EHRR 1272

Perry v United Kingdom (2003) 39 EHRR 76

Rotaru v Romania (2000) 8 BHRC 449

The following additional cases were cited in argument:

Advocate (HM) v R [2002] UKPC D3; [2004] 1 AC 462; [2003] 2 WLR 317, PC

Ambrose v Harris [2011] UKSC 43; [2011] 1 WLR 2435; 2012SC (UKSC) 53, SC(Sc)

Beggs v United Kingdom (Application No 15499/10) (unreported) given 16 October 2012, ECtHR

C v Police (unreported) 14 November 2006, Investigatory Powers Tribunal

Cadder v HM Advocate (HM Advocate General for Scotland intervening) [2010] UKSC 43; [2010] 1 WLR 2601; 2011SC (UKSC) 13, SC(Sc)

Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)

Connor v HM Advocate 2002 1JC 255

Foxley v United Kingdom (2000) 31 EHRR 637

Friedl v Austria (1995) 21 EHRR 83

Hamed v The Queen [2011] NZSC 101

Henderson v HM Advocate [2005] HCJAC 47; 2005JC 301

Herbecq v Belgium (Applications Nos 32200/96 and 32201/96) (unreported) given 14 February 1998, EComHR

Katz v United States (1967) 389 US 347

Klass v Federal Republic of Germany (1978) 2 EHRR 214

Kyllo v United States (2001) 533 US 27

Lüdi v Switzerland (1992) 15 EHRR 173

Peck v United Kingdom (2003) 36 EHRR 719

Peev v Bulgaria (Application No 64209/01) (unreported) given 26 July 2007, ECtHR

R v Wise [1992] 1 SCR 527

R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 AC 368; [2004] 3 WLR 58; [2004] 3 All ER 821, HL(E)

Salduz v Turkey (2008) 49 EHRR 421

Schenk v Switzerland (1988) 13 EHRR 242

Shimovolos v Russia (Application No 30194/09) (unreported) given 21 June 2011, ECtHR

Spiers (Procurator Fiscal) v Ruddy [2007] UKPC D2; [2008] AC 873; [2008] 2 WLR 608, PC

United States v Jones (2012) 132 SCt 945

United States v Knotts (1983) 460 US 276

Uzun v Germany (2010) 53 EHRR 852

APPEAL from High Court of Justiciary

The appellant, James Kinloch, was indicted before the Sheriff Court at Glasgow on charges of converting and transferring criminal property consisting of large sums of money in breach of sections 327(1) and 329(1) of the Proceeds of Crime Act 2002. At a diet on 13 September 2010 the appellant took a preliminary plea in the terms of a devolution minute that the police had acted unlawfully in obtaining evidence by surveillance since they had failed to obtain authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 to conduct the surveillance on the appellant or his associates. Sheriff Cathcart refused the minute and leave to appeal. On 16 December 2010, following a trial in the Sheriff Court at Glasgow before Sheriff Beckett, the appellant was convicted of the offences. Leave to appeal was refused by the High Court of Justiciary Appeal Court, on 26 June 2011, at the first sift (Lord Kinclaven) and, on 19 July 2011, at a second sift (Lady Paton, Lord Bannatyne and Lord Wheatley). On 2 November 2011 the Appeal Court (the Lord Justice Clerk (Gill), Lord Drummond Young and Lord Abernethy) granted leave to appeal to the Supreme Court.

The issues on the appeal to the Supreme Court were (1) whether the observations by the police, not having been authorised under the Regulation of Investigatory Powers (Scotland) Act 2000, breached the appellant's rights under article 8.1; and (2) (per the appellant) if so, whether the act of leading the evidence derived from that surveillance was incompatible with the appellant's rights under article 8.1 et separatim article 6.1 and thus ultra vires in terms of section 57(2) of the Scotland Act 1998. The Lord Advocate did not accept that the second issue arose in the appeal.

The facts are stated in the judgment of Lord Hope of Craighead DPSC.

Brian McConnachie QC and *Claire Madison Mitchell* (instructed by *Paterson Bell Ltd, Edinburgh*) for the appellant.

Andrew Stewart QC and *Kathleen Harper* , solicitor, (instructed by *Crown Agent, Crown Office, Edinburgh*) for the Lord Advocate.

The court took time for consideration.

19 December 2012. **LORD HOPE OF CRAIGHEAD DPSC** (with whom **BARONESS HALE OF RICHMOND, LORD MANCE, LORD KERR OF TONAGHMORE** and **LORD REED JJSC** agreed) handed down the following judgment.

1 This is an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998, which provides that an appeal lies to this court against a determination of a devolution issue by a court of two or more judges of the High Court of Justiciary. But the circumstances that have led to its coming here cannot be regarded as satisfactory. It is far from clear that the issue identified in the devolution minute is a devolution issue within the meaning of paragraph 1(d) of Schedule 6. As the determination against which the appeal has been brought was taken on paper at the second sift, we do not have a fully reasoned opinion of the judges for the decision that they took to refuse to grant leave to appeal. The motion for leave to appeal to the Supreme Court against their determination was not opposed by the Lord Advocate on the question of jurisdiction, although he did oppose it on the ground that it did not raise a matter of general public importance. So the Appeal Court in its turn did not give any reasons when it gave leave to appeal to this court.

2 As a result we are, in effect, having to deal with this case at first instance without having the benefit of the views of the judges of the High Court of Justiciary as to whether a devolution issue has been raised and, if so, how it should be determined. In *Follen v HM Advocate* [2001] 1 WLR 1668, para 10 the Judicial Committee observed that, where the Appeal Court refused leave without giving reasons, the board might find it difficult to appreciate that a petition for

special leave to appeal was without merit from the information given on paper by the petitioner. This is not such a case, and there are no grounds for criticising the judges for the fact that no reasons were given. The motion for leave was not opposed on this point. But it is unfortunate that, as there has been no reasoned judgment because of the procedural route the case has followed, the question whether a devolution issue has truly been raised appears to have been overlooked until now.

The facts

3 On 16 December 2010 the appellant, James Kinloch, was found guilty on indictment in the Sheriff Court at Glasgow of, on 6 February 2007 at various addresses in Glasgow including the appellant's home at 32, Prospecthill Crescent, converting and transferring criminal property consisting of large sums of money in breach of sections 327(1)(a)(b)(c)(d) and 329(1)(a)(b)(c) of the Proceeds of Crime Act 2002. He was, in short, convicted of money laundering. At a diet held on 13 September 2010 a preliminary plea was taken on the appellant's behalf that the police had acted unlawfully when they kept him under observation on 6 February 2007, as they had failed to obtain authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 to conduct covert surveillance on him and his associates. A devolution minute was moved in support of this argument. The sheriff refused the devolution minute. He also refused leave to appeal, and the case went to trial before another sheriff.

4 The devolution minute began by stating that the appellant intended to raise a devolution issue within the meaning of Schedule 6 to the Scotland Act 1998. The charges which had been brought against him were referred to, as were production 1 which was a copy of a form purporting to authorise directed surveillance on a group of individuals and production 2 which was a police surveillance log dated 6 February 2007. The observations which the police carried out from about 08.35 hours to about 12.00 hours were described. The appellant was seen leaving his car and entering the block of flats in which he lived, leaving the block carrying a bag and entering a car which then drove off. He was observed leaving various other locations and cars in Glasgow and then entering a taxi, carrying a bag which appeared to be heavy, which was later seen parked outside his brother's home. The police approached the taxi, and the appellant and his brother were detained. Various searches were carried out and large sums of money were recovered by the police.

5 Reference was made in the minute to article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8.1 provides that everyone has a right to respect for his private and family life, his home and his correspondence. Article 8.2 states that there shall be no interference by a public authority with the exercise of this right except such as is, among other things, in accordance with the law. Reference was also made to section 1(2) of the 2000 Act which defines what amounts to directed surveillance for the purposes of that Act, and to section 5(1) which provides that such conduct is lawful for all purposes if an authorisation under the Act confers entitlement to engage in it on the person whose conduct it is and that person's conduct is in accordance with the authorisation. The Crown conceded that no authorisation had been granted for the surveillance of the appellant, any associate of his or anyone else who was the subject of the observations by the police which were referred to in evidence at the trial.

6 The issue that the minute sought to raise was described in these terms:

> "That the police have acted unlawfully in that they failed to obtain authorisation to conduct covert surveillance upon the minuter or his

associates. That all of the subsequent actions by the police officers and the materials recovered under search warrants obtained by the police flowed from the said unlawful acts. That as a consequence the surveillance and the searchers (sic) and seizures which followed upon the minuter's arrest were unlawful and any evidence in respect of said surveillance or items seized is inadmissible in evidence."

The prayer at the end of the minute invites the court:

"to hold that the surveillance carried out on James Kinloch on 6 February 2007 was unlawful and that the productions 1 and 2 are inadmissible and that all subsequent action by the police including the obtaining of a warrant and the seizing of various items as described in crown production 5 was unlawful and, as a consequence, inadmissible as evidence."

7 In *Gilchrist v HM Advocate* 2005 1 JC 34 there was an invalid authorisation for the directed surveillance that the police carried out because it lacked the necessary detail. A devolution minute was lodged by the second appellant in which it was contended that his rights under article 8 had not been properly protected, and that for the Crown to lead evidence obtained by that infringement would compromise his right to a fair trial under article 6. The High Court of Justiciary rejected the submission that the events in question involved the obtaining of private information, which is defined by section 1(9) of the 2000 Act as including any information relating to a person's private or family life. It also rejected the submission that, because the surveillance operation was being carried out under an invalid authorisation, there was an infringement of the second appellant's rights under article 8. The effect of the decision was that the leading of the evidence was not incompatible with his rights under article 6 either. Giving the opinion of the Appeal Court, Lord Macfadyen said in para 21:

"What took place in Albion Street at the relevant time was that a plastic bag was handed by the first appellant to the second appellant. That was done in a public place. The event was there to be observed by anyone who happened to be in the vicinity, whatever the reason for their presence might be. It was in fact observed by police officers. They had reason to suspect that criminal activity was taking place. They therefore detained the appellants. On further investigation it was found that the bag contained controlled drugs. That sequence of events did not involve the obtaining of private information about the second appellant, in the sense mentioned in section 1(9) or in any broader sense. Nor did it involve any lack of respect for the second appellant's private life. What was done did not, in our opinion, amount to an infringement of the second appellant's rights under article 8."

8 A note of appeal was lodged following the appellant's conviction in which it was narrated, among other things, that the Crown relied on the decision in *Gilchrist* when opposing the devolution minute. It was submitted that the case of *Gilchrist* was wrongly decided. It was conceded that the sheriff was bound by that decision, but the sheriff was said to have erred in law by refusing to allow leave to appeal his decision. The sheriff said in his report that, as it was not in dispute that he was bound by *Gilchrist* , the only appropriate course was for him to refuse the minute and that, as he did not find his decision to be a matter of fine balance, he refused leave to appeal. It was also submitted that the sheriff who presided at the trial erred in repelling a submission of no case to answer.

9 The judge who dealt with the application at the first sift refused leave to appeal on both grounds. With regard to the point raised in the devolution minute, he said that the sheriff was entitled to refuse leave to appeal and that the note of appeal contained no adequate basis upon which to advance an argument that the

case of *Gilchrist* was wrongly decided. An opinion was then obtained from counsel as to whether the appeal was arguable. Various reasons were given for criticising the approach that was taken in *Gilchrist* to the question whether there had been a violation of article 8. It was said that the relevant decisions of the European Court of Human Rights supported the appellant's argument. The second sift panel, having considered that opinion, also refused to grant leave to appeal. In relation to the devolution minute all it said was that it agreed with the sheriff that he was bound by the decision in *Gilchrist* and that he did not err in refusing leave to appeal. On 2 November 2011 the Appeal Court, having heard counsel for the appellant and without giving reasons, granted leave to appeal to the Supreme Court.

10 In the statement of facts and issues lodged for the purposes of this appeal it is stated that the issues in the appeal are as follows:

> "(i) Whether the observations by the police, not having been authorised under the Regulation of Investigatory Powers (Scotland) Act 2000, breached the appellant's rights under article 8.1. The appellant maintains that the following second issue also arises and should be considered by the Supreme Court.
>
> "(ii) If so, whether the act of leading the evidence derived from that surveillance was incompatible with the appellant's rights under article 8.1 et separatim article 6.1 and thus ultra vires in terms of section 57(2) of the Scotland Act 1998? The respondent does not accept that the second issue arises in the appeal."

Is there a devolution issue?

11 Of the various questions listed in paragraph 1 of Schedule 6 to the Scotland Act 1998, the only one that is relevant to this appeal is that listed in sub-paragraph (d), as amended by section 12(2) of the Scotland Act 2012: a question whether a purported or proposed exercise of a function by a member of the Scottish Government is incompatible with any of the Convention rights or with EU law. That provision has to be read together with section 44(1), which provides that there shall be a Scottish Government whose members shall be (a) the First Minister, (b) such Ministers as the First Minister may appoint and (c) the Lord Advocate and the Solicitor General for Scotland. Section 57(2) of the 1998 Act provides:

> "A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law."

It is unlawful under section 6.1 of the Human Rights Act 1998 for the police to act in a way which is incompatible with a Convention right, as they are a public authority. But they are not members of the Scottish Government. So the question whether they have acted in a way that is incornpatible with any of the Convention rights is not a devolution issue within the meaning of paragraph 1(d).

12 The first issue in the statement of facts and issues is a reasonably accurate summary of the contents of the devolution minute. It refers to the actions of the police, and it raises the issue whether their observations were in breach of the appellant's rights under article 8. As the proceedings below indicate, what the appellant was seeking to do was to argue that *Gilchrist v HM Advocate* 2005 1 JC 34 was wrongly decided. His argument at the first sift was that the sheriff erred in refusing him leave to appeal on that matter. But, in contrast to what was submitted in *Gilchrist* , no mention was made at any stage of the question whether the act of the Lord Advocate in leading evidence obtained by the

surveillance would compromise the appellant's rights under article 6.

13 Taking it on its own terms, therefore, the devolution minute does not appear to raise a devolution issue at all. The question which it does raise is not one that can be determined by this court under the jurisdiction that it has been given by Schedule 6. The appellant seeks to remedy this defect by the second question raised in the statement of facts and issues. But the respondent objects to that question because the appellant gave no notice of an intention to raise that issue in his devolution minute. So there was no determination of that issue in the High Court of Justiciary as the question it raises was not before it, and this court does not have an original jurisdiction in these matters: *Follen v HM Advocate* [2001] 1 WLR 1668, para 9. Except in regard to devolution issues as defined by paragraph 1 of Schedule 6 to the Scotland Act 1998, every interlocutor of the High Court of Justiciary such as that pronounced by the judges at the second sift is final and conclusive and not subject to review by any court whatsoever: Criminal Procedure (Scotland) Act 1995, section 124(2); *Hoekstra v HM Advocate* [2001] 1 AC 216, 221. The decision at the second sift was that the sheriff was bound by the decision in *Gilchrist* . It does not appear from the reasons that were given that the panel gave any consideration to the question whether the act of the Lord Advocate in leading the evidence was incompatible with the appellant's rights under article 6.1.

14 The proper course, in view of the limits to the jurisdiction of this court under the statute, might well have been to dismiss this appeal as incompetent. But, with considerable hesitation, we decided that we should hear argument on the second issue. Three factors in particular have led us to this conclusion. The first is the fact that the Crown did not oppose the appellant's motion for leave to appeal to this court on this point. The second is the fact that the Appeal Court took the view that it should give leave to appeal. The third is that, as noted in para 12 above, what the appellant was really seeking to do was to enable the correctness of the decision in *Gilchrist* that the evidence led by the Lord Advocate was admissible to be re-examined. As Mr McConnachie QC for the appellant pointed out, that was the only court to have heard any submissions at all on the matter. It must be taken to have been satisfied that it was proper for it to give leave. Our decision to allow this appeal to proceed should not be taken, however, as an indication that this court is not aware of the limits to its jurisdiction, or of its responsibility to ensure that those limits are respected. Devolution minutes should say what they mean.

Was the act of leading the evidence incompatible with article 6?

15 The starting point for an examination of this issue, as it was in *Gilchrist v HM Advocate* 2005 1 JC 34, is the question whether there was a breach of the appellant's right to respect for his private life under article 8. The fact that evidence was irregularly obtained as the surveillance was not authorised under section 6 of the 2000 Act does not, of course, of itself make that evidence inadmissible at common law: see *Lawrie v Muir* 1950 JC 19. Nor does the fact that evidence was obtained in breach of article 8 necessarily mean that it would be incompatible with article 6 for that evidence to be led at the trial: *Khan v United Kingdom* (2000) 31 EHRR 1016, para 40; *PG v United Kingdom* (2001) 46 EHRR 1272, para 81.

16 It has also to be noted that any breach of article 8 in the obtaining of the evidence was due to acts of the police, not the Lord Advocate. It was so held in *McGibbon v HM Advocate* 2004 JC 60, where it was conceded that there had been a breach of article 8 in the obtaining of covert video and audio recordings of the appellants' incriminating conversations. Lord Justice Clerk (Gill) said in para 20

that the act that was relevant to section 57(2) of the Scotland Act 1998 was the act of the Lord Advocate in leading the evidence. The appellant in this case suggested that the distinction which the Lord Justice Clerk drew in *McGibbon* between the acts of the police and the Lord Advocate was unsound. I think that the Lord Justice Clerk was well founded in holding that the functions of the police and the Lord Advocate are constitutionally separate. The Lord Advocate was, however, responsible for the leading of the evidence.

17 It should be noted too that issues relating to the lawfulness of an interference with private life must be distinguished from those about the fairness of the use of evidence in the trial: *Perry v United Kingdom* (2003) 39 EHRR 76, para 48; also *HM Advocate v P* 2012 SC (UKSC) 108, para 18 for the test of fairness in this context. The tests as to whether there was a breach of these two articles are different, as are the remedies if they are held to have been breached. So the way the evidence was obtained may infringe article 8, yet the leading of that evidence may be held not to be incompatible with article 6. Nevertheless it would not be right to examine the issue as to whether the leading of the evidence in this case was incompatible with article 6 without examining the underlying question whether the appellant's article 8 right to respect for his private life was interfered with. The key to the whole argument lies in what one makes of the article 8 issue.

18 Decisions of the Strasbourg court on the question whether there has been an interference with the right to respect for a person's private life indicate that the answer to it will depend in each case on its own facts and circumstances. Private life is regarded by that court as a broad term not susceptible to exhaustive definition: *PG v United Kingdom* (2001) 46 EHRR 1272, para 56. The extent of the intrusion into the individual's private space will always be relevant, as will the use that is made of any evidence that results from it. The use of covert listening devices installed in the person's home or other premises where he has a reasonable expectation of privacy will require to have a clear basis in domestic law if it is to be held not to amount to an interference in breach of article 8: *Malone v United Kingdom* (1984) 7 EHRR 14, para 67; *Khan v United Kingdom* 31 EHRR 1016, para 27. There may also be a violation if the information that has been gathered by covert methods about a person's private life is systematically collected and stored in a file held by agents of the state: *Amann v Switzerland* (2000) 30 EHRR 843, paras 65–67; *Rotaru v Romania* (2000) 8 BHRC 449, paras 43–44. This case is not concerned with interferences of that kind.

19 There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom* 46 EHRR 1272, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG v United Kingdom* , para 57. A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of his rights under article 8.

20 The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the

person of criminal activity. But it could not reasonably be suggested that a police officer who came upon a person who has committed a crime in a public place and simply noted down his observations in his notebook was interfering with the person's right to respect for his private life. The question is whether it makes any difference that notes of his movements in public are kept by the police over a period of hours in a covert manner as part of a planned operation, as happened in this case.

21 I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public. Although Lord Macfadyen did not say so in as many words, it is plain that this was the basis for the decision in *Gilchrist v HM Advocate* 2005 1 JC 34. I would hold that it was rightly decided on this issue. There is nothing in the present case to suggest that the appellant could reasonably have had any such expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private. I do not think that there are grounds for holding that the actions of the police amounted to an infringement of his rights under article 8.

22 For these reasons I would answer the first issue in the statement of facts and issues in the negative. As the only ground for the submission that the leading of the evidence was incompatible with the appellant's rights under article 6.1 was that it had been obtained in a way that infringed his rights under article 8, the question raised by the second issue must be answered in the negative too. I would only add that it has not been suggested that there was any coercion or trickery by the police which, if it had been present, might have led to the conclusion that the appellant did not receive a fair trial: see *Bykov v Russia* (Application No 4378/02) 10 March 2009, paras 99, 102.

Conclusion

23 I would dismiss the appeal.

Appeal dismissed.

DIANA PROCTER, Barrister

Footnotes

1 Human Rights Act 1998, Sch 1, Pt I, art 6.1: "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ..." Art 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law ..."

2 Scotland Act 1998, as amended, s 44(1): "There shall be a Scottish Government, whose members shall be— (a) the First Minister, (b) such Ministers as the First Minister may appoint under section 47, and (c) the Lord Advocate and the Solicitor General for Scotland." S 57(2): see post, para 11 . Sch 6, para 1: "In this Schedule 'devolution issue' means— ... (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or with EU law ..."

[2016] A.C. 1131
In re JR38 (SC(NI))
Supreme Court
In re JR38
[2015] UKSC 42

2014 Nov 6;
2015 July 1

Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Toulson, Lord Hodge JJSC

Human rights — Respect for private life — Interference with — Photographic images of child engaging in street rioting — Publication of images to assist police identifying child and to deter further acts of public disorder — Whether child having reasonable expectation of privacy — Whether interference with child's Convention right to respect for private life — Whether interference justified — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8

The applicant, when aged 14, was involved with other young persons in serious rioting. Their continuing activities caused danger and fear to local residents and concern to the police. At the request of the police, photographic images of the applicant and others, taken during the course of the rioting, were published in local newspapers to assist the police in identifying the participants and as part of a campaign to deter further acts of public disorder. The applicant brought proceedings for judicial review against the police, alleging that use of the campaign to identify and highlight children and young persons involved in criminal activity as part of a "name and shame" policy without due process had breached the applicant's right to respect for his private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms1. The Divisional Court of the Queen's Bench Division in Northern Ireland refused the application, holding, by a majority, that article 8 was engaged since it was part of a context which disclosed to the public that the child in the image was in some way connected with serious public disturbances, but that the interference with the applicant's article 8 rights was justified in the circumstances, as being necessary and proportionate.

On the applicant's appeal—

Held , (1) (Lord Kerr of Tonaghmore and Lord Wilson JJSC dissenting), that the touchstone for the engagement of article 8.1 of the Convention was whether the applicant, on the facts, had a reasonable expectation of privacy in relation to the subject matter of his complaint; that the test was objective and had to be applied broadly, so that the court would, in taking account of all the circumstances, consider the applicant's attributes, the nature of the activity in which he had been involved, the place where it had happened and the nature and purpose of the intrusion; that the fact that the applicant was a child at the relevant time was not a sufficient reason from departing from the test, although that fact was potentially relevant in its application; that, since publication had taken place in the recent aftermath of criminal activity for the purpose of identifying those involved, it was far removed from the values which article 8 was designed to protect; and that, accordingly, the applicant's right to respect for his private life under article 8.1 was not engaged (post, paras 82 , 86 –90 , 95 , 98 , 100 –101 , 107 , 110 –115).

Dicta of Sir Anthony Clarke MR in *Murray v Express Newspapers plc* [2009] Ch 481, paras 35–37, CA and of Laws LJ in *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123, paras 20–22, CA approved.

Von Hannover v Germany (2004) 40 EHRR 1 and *Kinloch v HM Advocate* [2013] 2 AC 93, SC(Sc) applied.

PG v United Kingdom (2001) 46 EHRR 51 and *R (C) v Comr of Police of the Metropolis (Liberty intervening)* [2012] 1 WLR 3007, DC considered.

(2) Dismissing the appeal, that the conduct of the police in releasing the photographs

for publication did not in the circumstances amount to a breach of the applicant's right to respect of his private life under article 8 of the Convention; and that, accordingly, the Divisional Court's decision would be upheld (post, paras 81 , 82 , 104).

Per curiam . Had there been any interference by the police with the applicant's right under article 8.1 to respect for his private life it would have been in accordance with the law and have pursued a legitimate aim. It would have been necessary and proportionate because (i) the police were entitled to disclose the images for the purposes of the prevention and detection of crime and the apprehension and prosecution of offenders, (ii) publication furthered the objective of seeking to divert young people from criminal activity, (iii) the persistent and escalating violence presented a pressing priority requiring the identification of those responsible for it, and (iv) publication was a measure of last resort which struck a fair balance between the applicant's interests and those of the community. Accordingly, any such interference would have been justified under article 8.2 (post, paras 67 , 70 , 73 , 76 –80 , 103 , 104).

R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621, SC(E) applied.

Decision of the Divisional Court of the Queen's Bench Division in Northern Ireland [2013] NIQB 44 affirmed on different grounds.

The following cases are referred to in the judgments:

Bank Mellat v HM Treasury (No 2) [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700; [2013] 3 WLR 179; [2013] 4 All ER 533, SC(E)

Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)

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v Turkey (Application No 22427/04) (unreported) given 18 November 2008, ECtHR

Kinloch v HM Advocate [2012] UKSC 62; [2013] 2 AC 93; [2013] 2 WLR 141; 2013SC (UKSC) 257, SC(Sc)

Murray v Express Newspapers plc [2007] EWHC 1908 (Ch); [2008] 1 FLR 704; [2008] EWCA Civ 446; [2009] Ch 481; [2008] 3 WLR 1360; [2008] 2 FLR 599, CA

Niemietz v Germany (1992) 16 EHRR 97

PG v United Kingdom (2001) 46 EHRR 51

R v Oakes [1986] 1 SCR 103

R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011; [2012] 1 FLR 788, SC(E)

R (C) v Comr of Police of the Metropolis (Liberty intervening) [2012] EWHC 1681 (Admin); [2012] 1 WLR 3007; [2012] 4 All ER 510, DC

R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening) [2015] UKSC 9; [2015] AC 1065; [2015] 2 WLR 664; [2015] 2 All ER 727, SC(E)

R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening) [2009] UKSC 3; [2010] 1 AC 410; [2009] 3 WLR 1056; [2010] PTSR 245; [2010] 1 All ER 113, SC(E)

R (Wood) v Comr of Police of the Metropolis [2009] EWCA Civ 414; [2010] 1 WLR 123; [2009] 4 All ER 951, CA

Reklos v Greece (2009) 27 BHRC 420

Rotaru v Romania (2000) 8 BHRC 449, GC

S v United Kingdom (2008) 48 EHRR 50, GC

Sciacca v Italy (2005) 43 EHRR 20

Segerstedt-Wiberg v Sweden (2006) 44 EHRR 2

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iautas v Lithuania (2004) 42 EHRR 6

Von Hannover v Germany (2004) 40 EHRR 1

X v Iceland (1976) 5 DR 86

The following additional cases were cited in argument:

BB v France (Application No 5335/06) (unreported) given 17 December 2009, ECtHR

Botta v Italy (1998) 26 EHRR 241

Catt v Comr of Police of the Metropolis [2012] EWHC 1471 (Admin); [2012] HRLR 598, DC

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC

Friedl v Austria (1995) 21 EHRR 83

Gaughran's Application, In re [2012] NIQB 88; [2014] NI 1, DC(NI)

H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2012] UKSC 25; [2013] 1 AC 338; [2012] 3 WLR 90; [2012] 4 All ER 539, SC(E)

Hoppe v Germany [2003] 1 FLR 384; (2002) 38 EHRR 15

Hounga v Allen (Anti-Slavery International intervening) [2014] UKSC 47; [2014] 1 WLR 2889; [2014] ICR 847; [2014] 4 All ER 595, SC(E)

JH v United Kingdom (2011) 55 EHRR 27

JR27 (No 2), In re [2010] NIQB 143, DC(NI)

Johansen v Norway (1996) 23 EHRR 33

Kennedy v United Kingdom (2010) 52 EHRR 4

Lupker v The Netherlands (Application No 18395/91) (unreported) 7 December 1992, EComHR

MM v United Kingdom (Application No 24029/07) given 13 November 2012; The Times, 16 January 2013, ECtHR

Mayeka v Belgium [2007] 1 FLR 1726; (2006) 46 EHRR 23

Murray v United Kingdom (1994) 19 EHRR 193

Neulinger v Switzerland [2011] 1 FLR 122; (2010) 54 EHRR 31, GC

Ovchinnikov v Russia (Application No 24061/04) (unreported) given 16 December 2010, ECtHR

P v United Kingdom [2002] 2 FLR 61; (2002) 35 EHRR 31

Peck v United Kingdom (2003) 36 EHRR 41

Pfeifer v Austria (2007) 48 EHRR 8

Pretty v United Kingdom [2002] 2 FLR 45; (2002) 35 EHRR 1

R v Local Authority and Police Authority in the Midlands, Ex p LM [2000] 1 FLR 612

R v Secretary of State for the Home Department, Ex p Venables [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97; [1997] 2 FLR 471, HL(E)

R (F (A Child)) v Secretary of State for Justice (Lord Advocate intervening) [2010] UKSC 17; [2011] 1 AC 331; [2010] 2 WLR 992; [2010] 2 All ER 707, SC(E)

R (GC) v Comr of Police of the Metropolis (Liberty intervening) [2011] UKSC 21; [2011] 1 WLR 1230; [2011] 3 All ER 859; [2011] 2 Cr App R 18, SC(E)

R (J and P) v West Sussex County Council [2002] EWHC 1143 (Admin); [2002] 2 FLR 1192

R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC 38; [2015] AC 657; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)

R (R) v Durham Constabulary [2005] UKHL 21; [2005] 1 WLR 1184; [2005] 2 All ER 369, HL(E)

R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)

R (SB) v Governors of Denbigh High School [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)

R (T) v Chief Constable of Greater Manchester Police (Liberty intervening) [2014] UKSC 35; [2015] AC 49; [2014] 3 WLR 96; [2014] 4 All ER 159; [2014] 2 Cr App R 24, SC(E)

SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550; [2014] 1 WLR 998, CA

Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568; 107 FCR 133

Yousef v The Netherlands [2003] 1 FLR 210; (2002) 36 EHRR 20

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148; [2011] 2 All ER 783; [2011] 1 FLR 2170, SC(E)

Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2013] 1 WLR 3690; [2014] 1 All ER 638, SC(E)

APPEAL from the Divisional Court of the Queen's Bench Division in Northern Ireland

By a statement of relief and grounds, dated 21 September 2010 and amended on 11 June 2011, the applicant, who had been born in 1996, sought leave to apply for judicial review of the decision of the Police Service of Northern Ireland (1) to release photographic images, obtained from CCTV footage, which were widely believed to be of the applicant to the Derry Journal and the Derry News, and (2) to publish and to distribute leaflets throughout Cityside, Derry, of such images to assist the police in their identification of young persons participating in riotous activity in Londonderry. Pursuant to leave granted on 29 September 2010 by Treacy J, to bring the proceedings on the sole ground that use of "Operation Exposure" to identify and highlight children and young persons involved in criminal activity as part of a "name and shame" policy without due process breached the applicant's rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the applicant by notice of motion applied for judicial review on that ground. On 22 June 2011 the matter was transferred to the Divisional Court of the Queen's Bench Division in Northern Ireland. On 21 March 2013 the Divisional Court (Sir Declan Morgan LCJ, Higgins and Coghlin LJJ) [2013] NIQB 44 (i) refused the application; (ii) certified that a point of law of general public importance was involved in the decision, namely, whether the publication of photographs by the police to identify a young person suspected of being involved in riotous behaviour and attempted criminal damage could ever be a necessary and proportionate interference with that person's article 8 rights; and (iii) refused the applicant leave to appeal.

The applicant appealed pursuant to permission granted by the Supreme Court (Lord Kerr of Tonaghmore, Lord Wilson and Lord Reed JJSC) on 31 January 2014. The issue before the court was that certified by the Divisional Court as being a point of law of general public importance. The applicant, without the agreement of the police service, also sought to raise an issue whether the retention of the CCTV images of a child or young person by the police was a breach of his article 8 rights which could ever be justified in the absence of an ongoing criminal investigation.

On the hearing of the appeal the Supreme Court (i) made an order restricting publication of the name and address of the applicant and of any material which might lead to his identification, and (ii) declined to entertain the issue relating to any retention of the photographic material.

The facts are stated in the judgment of Lord Kerr of Tonaghmore JSC.

Mary Higgins QC and *Ronan Lavery QC* (both of the Northern Ireland Bar) (instructed by *MSM Law, Belfast*) for the applicant.

Publication of CCTV images by the police to identify a child or young person such as the applicant who was suspected of involvement in offences of riotous behaviour and attempted criminal damage cannot be a necessary and proportionate interference with that person's article 8 rights. Children and young persons in conflict with the law are entitled to a special measure of protection because of their age; it is therefore more difficult for the police to justify interference than it would be in the case of adults.

Permission is also sought to argue that retention of his images by the police on their

internal files amounted to a further breach of his article 8 rights. [Reference was made to *R (GC) v Comr of Police of the Metropolis (Liberty intervening)* [2011] 1 WLR 1230; *S v United Kingdom* (2008) 48 EHRR 50; *BB v France* (Application No 5335/06) (unreported) given 17 December 2009; *MM v United Kingdom* (Application No 24029/07) given 13 November 2012, The Times, 16 January 2013 and *In re JR 27 (No 2)* [2010] NIQB 143.]

The court should consider carefully the appropriate weight and priority to be given to the rights and best interests of a child in the applicant's position. That involves revisiting the Supreme Court's decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 in the light of the United Nations Committee on the Rights of the Child ("CRC"), *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (CRC/C/GC/14) (2013). In the article 8 balancing exercise it will only be in the most exceptional circumstances that the publication of the image of a child or young person could ever be justified, and then only as a measure of last resort, in order to avoid stigmatising and criminalising him: see the Human Rights Act 1998, sections 3, 6, 7, Schedule 1, Part I, article 8; the International Covenant on Civil and Political Rights, articles 14, 24; the United Nations Human Rights Committee, *CCPR General Comment No 17: Article 24 (Rights of the child)* (1989); the United Nations Convention on the Rights of the Child 1989 ("UNCRC"); *R (R) v Durham Constabulary* [2005] 1 WLR 1184, para 26; *Neulinger v Switzerland* [2011] 1 FLR 122, para 131; *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407; CRC, *General Comment No 10: Children's Rights in Juvenile Justice* (2007) (CRC/C/GC/10), paras 10, 13–15, 18, 24–25, 64, 71, 96–97; *Concluding Observations of the United Nations Committee on the Rights of the Child (49th session) on Reports submitted by the United Kingdom of Great Britain and Northern Ireland* (2008) (CRC/C/GBR/CO/4); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) ("the Beijing Rules"), rules 1, 5, 7, 8, 14; *United Nation Guidelines on the Prevention of Juvenile Delinquency* (1980) ("the Riyadh Guidelines") (A/RES/45/112); *United Nation Standard Minimum Rules for Non-custodial Measures* (1980) ("the Tokyo Rules"); Criminal Justice (Children) (Northern Ireland) Order 1998 (SI 1998/1504), articles 4, 5, 22; Children and Young Persons Act 1933, section 49; Justice (Northern Ireland) Act 2002, section 53; Police (Northern Ireland) Act 2000 (General Functions), section 32; and the Data Protection Act 1998, sections 1, 2, 4, 27, 29, Schedule 1, paragraphs 1–5; Schedule 2, paragraphs 1, 5, Schedule 3, paragraphs 7, 54, amending the Anti-terrorism, Crime and Security Act 2001, section 93, by the insertion of section 64A (photographing of suspects) and sections 113A and 113B relating to criminal record certificates.

A person's photographic image is "informational privacy" which engages article 8: see *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 and *Von Hannover v Germany* (2004) 40 EHRR 1. Publication of the applicant's image without consent therefore engages article 8: see *Reklos v Greece* (2009) 27 BHRC 420, paras 42–43. The Divisional Court, in concluding that publication was justified, misunderstood what the best interests of children and young persons required. It failed to carry out a proper determination of what those rights were and failed to give proper weight to the applicant's rights-based interests. The Divisional Court accordingly failed to interpret article 8 consistently with the state's international obligations under articles 3, 37 and 40 of the UNCRC and rules 1 and 5–8 of the Beijing Rules. As a result, it approached the article 8 balance through the prism of law and order and, apart from recognising the child's right not to be stigmatised, not through the prism of the child's best interests and rights. It failed to recognise the greater protections which should be accorded to children and young persons and to give due weight to the need to protect the presumption of innocence, a child's right to rehabilitation and reintegration into the community. It placed undue weight on the objects of crime detection, deterrence and the punishment of offenders and the maintenance of law and order. It failed to give any weight to the absence of any individual consideration of the relevant facts in each published image, and to the lack of evidence of serious harm to the applicant or others as a result of such behaviour. [Reference was made to *Bank Mellat v HM Treasury (No 2)* [2014] AC 700

and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657.]

Although the Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a "best interests" provision, the European Court of Human Rights has made it clear that they are accommodated within the fair balance of article 8: see *Johansen v Norway* (1996) 23 EHRR 33. The most relevant obligation is contained in article 3(1) of the UNCRC which is binding in international law; the child's best interests are treated as a primary consideration, but not the paramount consideration: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 and *Wan v Minister of Immigration and Multicultural Affairs* (2001) 107 FCR 133. [Reference was made to *SS (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 998.] However, in the present context, great weight has been attached by the European Court of Human Rights to the child's best interests, giving them high priority and a heavier weight than other considerations: see *P v United Kingdom* [2002] 2 FLR 61; *Hoppe v Germany* [2003] 1 FLR 384 and *Mayeka v Belgium* [2007] 1 FLR 1726. [Reference was also made to *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338 and *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690.] This had led to the description in some cases of the appropriate level as "paramount": see *Yousef v The Netherlands* [2003] 1 FLR 210. For that reason the *ZH* case [2011] 2 AC 166 should be revisited so as to approach the issue in the light of *UN General Comment No 14* (2013).

The CRC's approach to the child's best interests demonstrates the high degree of justification demanded by article 8 where the rights-based interests of the child or young person are outweighed by other conflicting interests and rights. In such a case a different approach is required to the prevention of disorder and crime among the young; much greater weight has to be given to the child's interests and greater emphasis must be put on rehabilitation and restorative justice objectives. *UN General Comment No 14* highlights the danger inherent in applying an undefined "best interests" test which allows the rights-based best interests of the child to be manipulated and abused by public authorities: see *MacDonald, The Rights of the Child: Law and Practice* . The absence of evidence that the rights-based best interests were objectively considered and given primacy as a consideration will make it likely that a fair balance between the competing interests has not been struck.

The best interests of the child require consideration of all the relevant circumstances which relate to their arising out of the panoply of the child's rights. In the present case that would include the following six interests of the child. (1) An interest in being presumed innocent until proved guilty in accordance with due process. (2) An interest in being protected from being publicly shamed by exposure through publication of his image and a text denouncing him as a wrongdoer where a charge has not been brought and he is accorded a lesser level of protection than a juvenile who has been convicted of a criminal offence and thereby enjoys anonymity: see *Ovchinnikov v Russia* (Application No 24061/04) (unreported) given 16 December 2010. (3) An interest in being protected from stigmatisation as being a person suspected by the police of involvement in sectarian disorder: see *S v United Kingdom* 48 EHRR 50, para 122. Public labelling of a child, as happened here, is particularly harmful in making it more difficult for him to move out of such conduct and desist from future offending: see *UNCRC General Comment No 10* , paras 15, 64; "Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland" O'Mahoney and Campbell (see chapter 4 of *International Handbook of Juvenile Justice* (2006), eds Junger-Tas and Decker); Bernberg & Kronn, "Labelling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood" (2003) 41 Criminology Issue 4, pp 1287–1318. (4) An interest in having his reputation and social identity protected from interference by state agents in indiscriminate publicity when he has a reasonable expectation of privacy: see *Pretty v United Kingdom* [2002] 2 FLR 45; *Campbell v v MGN Ltd* [2004] 2 AC 457; the *S* case 48 EHRR 50 and *Pfeifer v Austria* (2007) 48 EHRR 8. In determining whether an individual had a reasonable expectation of privacy so as to engage article 8, the test is that of a reasonable person of ordinary sensibilities and will depend on the circumstances: see

Murray v Express Newspapers plc [2009] Ch 481 and *Sciacca v Italy* (2005) 43 EHRR 20. *Kinloch v HM Advocate* [2013] 2 AC 93, which concerned an adult, is distinguished; (5) An interest in the protection of the development, without outside interference, of his personality in his relations with others: see *Botta v Italy* (1998) 26 EHRR 241 and *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, para 93. (6) An interest in being protected from criminalisation whether by being identified to members of the public as a person wanted for police interview in connection with serious public disturbances or by being charged, or otherwise dealt with by the criminal authorities. The Beijing Rules stress the need to avoid criminalisation for behaviour which does not cause serious harm. Properly considered, publication of the applicant's image was not in his best interests and violated article 8. The Divisional Court, by incorrectly assessing those considerations, failed to give proper weight to the special protections to which children are entitled because of their age and reached the wrong conclusion.

The police approach, endorsed by the Divisional Court, justifying publication and their policy, lacks any child-centred focus and consideration of the rights and the rights-based best interests of the child. That approach, adopted in implementing the Operation Exposure programme, unlawfully breached the applicant's rights under the UNCRC and the Beijing Rules as well as his article 8 rights. Contrary to the Operation Exposure protocol, which required individual consideration of each individual image prior to publication, a blanket approach was adopted to the release of all the photographic material. Although the Divisional Court acknowledged the importance of respecting a child's privacy in the criminal justice system because of the risk of stigmatisation and considered the importance of the applicant's rights, it adopted a different approach to the article 8 balancing exercise. Publication was indiscriminate and arbitrary and was not in accordance with the law: see *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49. Had the Divisional Court adopted the correct approach, and given due weight to the applicant's rights as well as to the duties of the police and their Policy Directive 13/06, it could not have concluded that the interference was justified. [Reference was made to *S v United Kingdom* 48 EHRR 50, paras 66–67, 121–125.] Alternatively, in the fact-specific context of article 8 justification, the Divisional Court had to be satisfied of the existence and cogency of evidence of a pressing social need before publication could be justified. There was no finding of any such evidence on which a conclusion that the applicant's article 8 rights had not been breached could be based: see *R (J and P) v West Sussex County Council* [2002] 2 FLR 1192 and *R v Local Authority and Police Authority in the Midlands, Ex p LM* [2000] 1 FLR 612. On the facts, publication was not a proportionate response to the interference with the applicant's article 8 rights: see *Peck v United Kingdom* (2003) 36 EHRR 41.

Tony McGleenan QC and *Paul McLaughlin* (both of the Northern Ireland Bar) (instructed by *Crown Solicitors Office, Belfast*) for the police service.

The issue regarding retention is raised for the first time on this appeal. Permission to appeal has not been given, and should not be given, to argue that issue now: see *Hounga v Allen (Anti-Slavery International intervening)* [2014] 1 WLR 2889. [Reference was made to the forthcoming appeal on that issue to the Supreme Court in *In re Gaughran's Application* [2014] NI 1.]

The context in which the published image was captured was public, not private, and the actions of the police service do not fall within the scope of article 8, which is accordingly not engaged: see *Lupker v The Netherlands* (Application No 18395/91) (unreported) 7 December 1992; *JH v United Kingdom* (2011) 55 EHRR 27; *Friedl v Austria* (1995) 21 EHRR 83; *Kinloch v HM Advocate* [2013] 2 AC 93; cf *Peck v United Kingdom* (2003) 36 EHRR 41. The approach set out in *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123 identified three touchstones to the boundaries of article 8 in the present type of situation: (i) that the alleged interference with the individual's privacy attained a certain level of seriousness; (ii) on the facts, the individual concerned had a reasonable expectation of privacy and (iii) the breadth of articles 8, 9 and 10 may be curtailed by the particular justifications available to the state under article 8.2. Applying that approach, the court should therefore adopt a holistic approach to the assessment of the facts and circumstances in which the photographs are taken and

deployed before reaching a decision as to whether article 8 is engaged: see *Catt v Comr of Police of the Metropolis* [2012] HRLR 598; *PG v United Kingdom* (2001) 46 EHRR 51; *Von Hannover v Germany* (2004) 40 EHRR 1 and the *Kinloch* case. [Reference was made to *Murray v United Kingdom* (1994) 19 EHRR 193.] The majority in the Divisional Court in the present case accepted that the question whether the use of photographs constituted an interference with article 8 requires a fact-specific consideration in every case. The applicant clearly never had any reasonable expectation of privacy in relation to the circumstances in which the images were taken or as to the use to be made of them by the police. In particular, the images were not captured during covert surveillance but by publicly located CCTV cameras. They were taken for the purposes of identification of persons involved in criminal activity and disseminated for that purpose. There is no evidence that any other person apart from the applicant and his father identified him from publication of the images. The police actions did not therefore amount to an interference with the applicant's article 8 rights.

If, however, article 8 was engaged and there was an interference with the applicant's rights, it was justified under article 8.2. The proper approach, which is one of proportionality, is that set out in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 and *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. The interference was "in accordance with the law": see section 32 of the Police (Northern Ireland) Act 2002; *Kennedy v United Kingdom* (2010) 52 EHRR 4 and *Rotaru v Romania* (2000) 8 BHRC 449. The publication was "necessary" for the administration of justice and complied with the Data Protection Act 1998: see sections 1(1), 2(g), 4(4), 29 and Schedules 1, 2 and 3. [Reference was made to *R (F (A Child)) v Secretary of State for Justice (Lord Advocate intervening)* [2011] 1 AC 331, para 64.] As the Divisional Court found, publication was in pursuit of a legitimate aim: the process was designed to protect the public by preventing re-offending and ensuring that the child involved was diverted from such activity. That reflected the need to protect him and to address his welfare in circumstances where he was exposed to sectarian public disorder. The risk of stigmatisation could not outweigh those factors.

The interference was therefore necessary in a democratic society: see *R (T) v Chief Constable of Greater Manchester (Liberty intervening)* [2015] AC 49, para 114. In considering that aspect the court allows the decision-maker a margin of appreciation which recognises that that authority is often the best entity to make the assessment. Here the evidence was that robust procedures had to be satisfied before publication was permissible; that the Divisional Court had to be satisfied that release of the images was necessary in furtherance of legitimate purposes against the background of substantial police efforts to address offending conduct by way of diversionary disposal where possible. In concluding that the police decision was proportionate the Divisional Court reached a determination which was sustainable: see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. There was no failure to give proper consideration to the best interests of the applicant as a child: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166. Those interests were already reflected in the general PSNI Policy Directive PD 13/06: see *S v United Kingdom* (2008) 48 EHRR 50, para 124.

Higgins QC replied.

The court took time for consideration.

1 July 2015. The following judgments were handed down.

LORD KERR OF TONAGHMORE JSC (with whom **LORD WILSON JSC** agreed)

Introduction

1 It is a common assumption that young people of succeeding generations become increasingly sophisticated and worldly-wise. Certainly, the young people of today have access to a range of external experiences, particularly through social media, that would have been inconceivable even 20 years ago. But the street urchins of Dickens's day were, arguably, just as knowing vis-à-vis their

elders, as are today's youth. The seeming sophistication or worldliness of today's children does not mean that they are not as inherently immature as have been children throughout the ages. Apparent social sophistication is not to be equated with a lack of naiveté. Giving the appearance of being older than their years should not be confused with possession of mature judgment. Protection of our children from the consequences of their immaturity and the preservation of their innocence are just as vital as they have ever been.

2 The young man who is the appellant in this case is now 18 years old. He was born on 16 July 1996. On 23 and 26 July 2010 two newspapers, the *Derry Journal* and the *Derry News* respectively, published an image of him. He was at that time barely 14 years old. These photographs had been published by the newspapers at the request of the police. The publication of the appellant's photographs and those of others who had been involved in public disorder in Londonderry was part of a police campaign known as "Operation Exposure" which was designed to counteract sectarian rioting at what are called "interface areas" in parts of Derry. Interface areas are situated at the boundaries of parts of the city which are predominantly inhabited by one or other of the two main communities.

3 The appellant argues that publication of photographs of him constituted a violation of his article 8 rights. The Divisional Court of the Queen's Bench Division in Northern Ireland (Sir Declan Morgan LCJ, Higgins and Coghlin LLJ) [2013] NIQB 44 dismissed his application for judicial review on 21 March 2013.

Factual background

4 Mr McGleenan QC, counsel for the chief constable, has described the factual background as "convoluted" and that is certainly not an exaggeration. The case made on the appellant's behalf in the judicial review proceedings, by which he sought to challenge the legality of the police operation, was made largely through affidavits from his father. On 14 July 2010 the *Derry Journal* had published images of closed circuit television ("CCTV") pictures which had been taken during serious rioting in Derry in July 2010. In the first of his affidavits, the appellant's father claimed that these included images of his son. He also claimed that leaflets published and distributed by police on 16 August 2010 which again contained CCTV images of young people involved in rioting identified the appellant.

5 When the application for leave to apply for judicial review was first heard, two particular images from the 14 July issue of the *Derry Journal* and the leaflets were stated by his counsel to be those of the appellant. It was later established that, not only were these not images of the appellant, he did not appear at all in that particular issue of the newspaper or in the leaflets.

6 The appellant had been interviewed by police on 1 July 2010. He was questioned about his involvement in rioting on 24 May 2010 and 8 June 2010. He was shown CCTV footage of both incidents and he claimed to be able to identify himself from the footage of both incidents. He was also shown a booklet of some 115 photographs of persons involved in rioting on various dates in May and June 2010. These included the images contained in the leaflets which were later published by police on 16 August 2010. The appellant did not identify himself in any of these images.

7 In light of the statement by counsel for the appellant at the leave hearing that the appellant's image did appear in one of the photographs contained in the leaflet, he was interviewed again in relation to the incident portrayed in that photograph. During this second interview the appellant and his father were shown CCTV footage. As a result of this viewing, both concluded that, contrary to what had been said on his behalf at the application for leave to apply for judicial review, the appellant was not depicted in the image in the leaflet which had

formerly been chosen as having identified him. So far as the image in the *Derry Journal* of 14 July 2010 was concerned, it was established that this was of someone else entirely. In sum, in neither of the particular images which counsel had told the court were of the appellant, was he in fact portrayed.

8 Following the second interview, a further affidavit was prepared for the appellant's father. It is claimed that this affidavit has been filed in the proceedings. Apparently, it has never been sworn, so it seems unlikely that it has actually been filed. In any event, in this affidavit, it was claimed that the appellant's image appeared in issues of the *Derry Journal* and the *Derry News* published on 23 and 26 July 2010 respectively. Both issues contained the same photograph. The appellant's father stated that the image came from video footage of an incident which he believed had occurred on 6 June 2010. It is now accepted by the respondent that the appellant is the figure shown in the photograph reproduced in these two issues of the newspapers but the appellant's image was captured on 5 June rather than the sixth as the appellant's father believed.

9 The appellant's father also claimed in this second affidavit that, during the interview on 1 July 2010, his son had identified himself as the child throwing stones in the photograph that was published in the *Derry Journal* and the *Derry News* on 23 and 26 July 2010. This is disputed by the respondent. In affidavits filed on his behalf, the interviewing officer has said that, although CCTV footage of events on 5 June had not been shown during the interview on 1 July 2010, the appellant and his father were shown the image later reproduced in the newspapers on 23 and 26 July but the appellant had not been identified at that stage. Indeed, formal identification of the appellant was not made as the person shown in the photograph published on those dates until 11 May 2011. By that time, the six month limitation period that applies to any charge that might have been preferred against the appellant had elapsed. Accordingly, no action was taken against him.

10 The appellant was involved in offences other than those relating to the publication of his photograph. On 6 August 2009 he was arrested on a charge of riotous behaviour which had occurred on 13 July 2009 at Butcher's Gate, Derry. This was dealt with by a restorative caution on 29 June 2011. He was also charged with two separate offences of riotous behaviour alleged to have occurred on 6 June and 8 June 2010 and with possession of an offensive weapon and attempted criminal damage on the latter date. A youth conference was directed by Public Prosecution Service on 16 December 2010. The appellant failed to engage with this and on 31 May 2011 it was decided that he should be prosecuted for these offences. The riotous behaviour charges were dealt with by a youth conference ordered by the court on 23 October 2012. The possession of offensive weapon and attempted criminal damage charges were not proceeded with.

Operation Exposure

11 Chief Inspector Chris Yates is the area commander of Police Service of Northern Ireland ("PSNI") for the Foyle District of Londonderry. He has described how interface violence between the two communities in this district was a regular occurrence during periods of heightened tension such as when parades were taking place. The number of incidents of violence decreased significantly during the period from 2006 to early 2009. But in the early part of 2009 it was observed that the number of such incidents at one particular location, the Bishop Street/Fountain estate interface, had increased substantially. This was of particular concern to the police because there is a residential home for the elderly and vulnerable in the vicinity. Inter-community violence in the area again became a regular occurrence, flaring up significantly during two parades in July and

August.

12 The level of violence increased yet again during May and June 2010. It was more serious and prolonged than any experienced by Mr Yates since he had begun service in the Foyle district. Intelligence received by police suggested that vigilante groups were being formed on one side and dissident republicans were encouraging violence on the other side. Community representatives on the nationalist side informed police that they had lost influence over the youths in their area; indeed they had been confronted on occasions by dissident republican elements. Police officers on the ground reported on the absence of community representatives from either side during the disturbances.

13 The ongoing violence drained police resources and, in the estimation of Mr Yates, threatened to undermine community confidence in PSNI's response. Indeed, police were criticised for having failed to deal with the continuing disorder. The issue was raised at a meeting of the district police partnership on 16 June 2010. This is composed of, among others, local councillors and community representatives. The ongoing violence was discussed at the meeting and general concern was expressed.

14 The matter was discussed again on 1 July 2010 when Chief Inspector Yates was present at a meeting of the City Centre Initiative. This was attended by representatives of various political parties and community groups. Everyone present agreed that the violence at the interface had to be brought to an end. The chief inspector informed those present that the young people engaged in the recent public disorder had to be identified in order to ensure an effective response to the interface violence. He produced a booklet of photographs and asked all who were present to inspect these and to help him identify those captured in the images. He said that if the persons involved were not identified at the meeting or at later private meetings which he offered to hold with any of the representatives present, he would consider having them published in the local press. None of those depicted in the photographs was identified. The chief inspector was asked to defer placing the images in the newspapers and he agreed to do so for a period of two weeks. In the event, he was not contacted by anyone who had attended the meeting and he proceeded to arrange for the publication of the photographs in the local press.

15 The final decision as to whether particular images should be released to the press or contained in leaflets to be distributed by the police fell to Temporary Superintendent Sam Donaldson. In an affidavit filed on behalf of the respondent, Mr Donaldson explained how the strategy of seeking public assistance in identifying offenders from still images and CCTV footage had been developed in G police district in 2008 and 2009. (Foyle is in G police district.) The strategy had proved to be a particularly effective tool in identifying offenders involved in interface violence and acts of public disorder. What follows in the next six paragraphs is Mr Donaldson's account of how the strategy is implemented.

16 Operation Exposure is a system of investigation of crime which comprises an elaborate series or stages of inquiry. The first stage involves the investigating officer inspecting the details of the individual offence which have been entered on the police database. At the next stage the officer follows what might be described as conventional lines of inquiry. This can include the recording of statements from injured parties and witnesses, the interviews of suspected offenders and, if the state of the evidence justifies it, the preparation of a prosecution file. When part of the criminal inquiry involves taking possession of CCTV or still photographic images, the investigating officer is not automatically entitled to make use of these to pursue the inquiry. He or she is required to ensure that all reasonable steps have been taken to identify a suspect by a less intrusive means. These may

include door-to-door inquiries; forensic examination of items of evidence; circulation of details among other police officers; intelligence research; and liaison with other police services including An Garda Siochana.

17 When it is clear that all lines of reasonable inquiry have been exhausted, the investigating officer is authorised to request the CCTV unit to develop the best image from the available footage. This is then uploaded to police internal electronic briefing pages in order to facilitate identification of suspects. All serving police officers have access to these pages. As part of the Operation Exposure process, the briefing pages carry photographs of the persons that the police wish to identify, together with details of the incident under investigation. Officers are reminded to speak to the Operation Exposure officer if they are able to identify anyone from the images. Particular attention is paid to the role of neighbourhood officers because of their local knowledge and the greater likelihood of their being able to identify individuals. These officers are regularly briefed and it is the responsibility of the Operation Exposure officer to ensure that this particular line of inquiry has been pursued before proceeding to the next stage.

18 If it proves impossible to identify a suspect by internal police procedures, the question of releasing images to outside agencies is considered. The Operation Exposure officer must ensure that all other lines of inquiry have been fully pursued before seeking authorisation to release the images. A senior officer such as Mr Donaldson is briefed on the circumstances of the case, the lines of inquiry which have been pursued and the steps that the investigating officer has taken in relation to the identification of the suspect. The senior officer is also informed about the location of the incident under investigation; the injuries, if any, involved in the suspected offence; the ages of the injured parties and the estimated age of the offender. All of this is recorded in an official journal, together with any queries that may have been raised, for instance, about whether all necessary steps have been taken to identify a suspect by some other means. Consideration of the reasons in favour of and those against the release of a specific image is also recorded. All these steps are prescribed by an Operation Exposure guidance document which is modelled on national guidance issued by the Association of Chief Police Officers.

19 In accordance with specific provisions in the guidance documents, human rights issues are also considered. The authorising officer requires to be satisfied that not only have all other reasonable lines of inquiry been pursued but that the release of the image will have a positive effect on the investigation. The proportionality of an order for release is also considered—this involves considering whether it is in the public interest that it be released; the risk to the community should the individual depicted in the image remain unidentified; the frequency of the type of offence involved; and the consequences of it continuing to be committed.

20 Operation Exposure was not specifically designed as a general aid in the investigation of crimes committed by juveniles but where it is clear that the image to be released is that of a young person, particular care is taken and greater weight is given to the potential implications of the release of the image. Inquiry is made as to whether liaison has taken place with the local police officer who has a particular knowledge of young people in his area (the police youth diversion officer). Consideration is given to whether there is a risk to the young person from the community (in other words, whether he or she might be the target for a so-called "punishment beating"). The apparent age of the young person is taken into account. Unfortunately, it is the police experience that some young people involved in interface violence may be below the age of criminal responsibility. Where the authorising officer considers that this might be the case, release of the

image will not be authorised.

21 Finally, a decision whether to release the image of a young person will involve consideration of where the best interests of the child lie. The authorising officer addresses this question in terms of whether it would be more beneficial to allow the young person to remain unidentified with the possibility that he or she would continue in the unlawful conduct or that it is better to intervene, in order to protect the young person from the dangers associated with involvement in public disorder. This examination takes place against the background that the preferred choice of the police service is to deal with an offending child in ways that do not involve the criminal justice system. The most common result of a child being identified as having taken part in this type of offending is what are described as "lower level interventions" such as parent/guardian involvement or youth diversion opportunities. Mr Donaldson stated that these are "often the desired, and most appropriate outcome".

22 The circumstances in which the appellant's image came to be published were explained by Inspector Jon Burrows. He described the sectarian violence that had occurred between April and July 2010 at the Fountain Street/Bishop Street interface. In that period there were at least 46 sectarian incidents there and over 100 offences were committed. Approximately 75 young people were involved. Police warnings were issued informing the public that CCTV filming of the disorder would take place. Notwithstanding this, violence at the interface continued unabated.

23 The inspector then considered whether to seek authorisation for the publication of images of those involved in the disorder. Before applying for this he conducted a risk assessment. This included addressing the risk that young people who were identifiable from the images might be targeted. This was considered to be low but mitigation measures were put in place, involving the obtaining of intelligence on the likelihood of targeting taking place and ensuring that all images published would be accompanied by a caption which referred to the presumption of innocence.

24 Inspector Burrows realised that the use of Operation Exposure carried a risk that young people identified by it would become criminalised and stigmatised. He sought to counteract this by adopting a "no positive charge policy", in other words that there would be a presumption in favour of diversion away from sectarianism and crime rather than prosecution. Highlighting the use of engagement procedures whereby the police and other agencies engage with the young person was an integral part of the Operation Exposure exercise.

25 The inspector produced a copy of the internal police guidance that had been prepared in order to regulate the implementation of the Operation Exposure policy. This stipulated that all other means of identifying and tracing the suspect must have been exhausted before images were published. It also required that special care be taken when release of images of suspects under 18 years was being contemplated. The test for disclosure would be more rigorously applied in those instances. Social services should be approached and offered the opportunity to view the images so that release of such images to the media could be kept to a minimum.

26 All of these steps were taken before the Operation Exposure exercise in July 2010 was authorised. Subsequently, in August 2011 that exercise was retrospectively analysed. The results analysis revealed that 102 offences had been committed between 24 May and 30 June 2010. The release of images in July 2010 had resulted in the identification of 37 persons (including the appellant) who had been engaged in interface violence. Of these 37, only five had been charged with

criminal offences. The others had been dealt with through the youth diversion or the youth conferencing facility. This was despite the fact that, in Inspector Burrows's estimation, there was sufficient evidence to charge the young people involved with criminal offences. The reason that he gave for this was that the overarching objective of the exercise was to identify the offenders and help them to divert from the type of offending that they had been engaged in.

27 The results analysis also disclosed that there had been a 50% reduction in sectarian crimes in the Foyle district in July and August 2010 from the number committed in the same months the previous year. The report also recorded a marked reduction in sectarian incidents at the interface at Fountain Street, Londonderry.

The issues

28 The case made on behalf of the appellant before the Divisional Court was that the publication of photographs of him in the Derry Journal and the Derry News constituted a breach of his right to respect for a private life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). This was the single issue. And the question certified by the Divisional Court reflected that position. It was in these terms:

> "Whether the publication of photographs by the police to identify a young person suspected of being involved in riotous behaviour and attempted criminal damage can ever be a necessary and proportionate interference with that person's article 8 rights."

29 On the hearing of the appeal to this court, the appellant sought to introduce an argument that the retention of images of him by the police constituted a separate violation of article 8. Separate, that is, from the claim that supplying photographs of the appellant to the newspaper for publication was a breach of his article 8 rights. Unsurprisingly, the respondent objected to this new ground of challenge. The question of the legality of retaining the images (as opposed to publishing them) had not been considered by the Divisional Court because that court had not been addressed on the issue. Indeed, Sir Declan Morgan LCJ at para 22 of his judgment had said this about the nature of the application with which the court was dealing:

> "This application is not concerned with the taking of photographs of the riotous and disorderly activity or the retention and distribution of those photographs internally to police officers for the purpose of identifying offenders ... The complaint is focused on the provision of those photographs to the media and solely concerns the decision to do so in circumstances where it was apparent that some of the photographs were images of children."

30 It was decided that the appellant should not be permitted to introduce this new ground of challenge before this court. As the respondent pointed out, evidence about the reasons for retention of the appellant's photographs and whether these were to be retained for any particular length of time had not been given. To allow this particular challenge to proceed in the absence of such evidence would plainly be wrong. The sole remaining issue, therefore, is whether the publication of the photographs of the appellant constituted a breach of his article 8 right.

Is article 8 engaged?

31 The majority in the Divisional Court held that article 8 was engaged. Sir Declan Morgan LCJ dealt with, at para 30:

> "In this case the photograph is not just an image of the child. It is part of a context which discloses to the public that the child in the image is at least

wanted for interview in connection with possible involvement in serious public disturbances. At the time of publication it had not been established that the child had participated in any offence. The domestic and international provisions set out at paras 23–26 above [section 53 of the Justice (Northern Ireland) Act 2002, article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998, the Beijing Rules, the United Nations Convention on the Rights of the Child] indicate the importance of respecting the privacy of children in the criminal justice system because of the risk that they will become stigmatised with a consequent effect on their reputation and standing within the community. If participation in criminal activity is established their rehabilitation may thereafter be impaired. Given the breadth of the concept of private life the publication of photographs suggesting that police wished to identify this child in connection with these serious offences was an intrusion into his private life."

32 Higgins LJ did not agree. He considered that article 8 was not engaged. In para 63 of his judgment he said:

"... The answer to the question whether a private life right exists in a public setting will be found by considering whether the person had a reasonable expectation of privacy in the public circumstances in which he placed or found himself. In this case the applicant placed himself in public view among a crowd of other persons engaged, allegedly, in public disorder. He was open to public view by anyone who happened to be watching, be they police or civilians. He took the risk of his presence and any activities being observed and noted down or otherwise recorded. What was the aspect of his private life which was in issue at that stage? None has been ventured. There must be an onus on the applicant to establish the aspect of his private life which he states is engaged at that stage or to characterise the interest which he seeks to protect. As in *Kinloch v HM Advocate* [2013] 2 AC 93 there can have been no expectation of privacy in the circumstances of the instant case. The criminal nature of his activities or his presence, (if that is what they are), are not aspects of his life which he is entitled to keep private. Such activities should never be an aspect of private life for the purposes of article 8. In my view a criminal act is far removed from the values which article 8 was designed to protect, rather the contrary. In this case the applicant was photographed by the police, rather than his presence or activities simply noted down. I do not consider that is a material distinction. The photograph is probably a more accurate record of what is on-going. In my view the taking of the photographs of the claimant, in the particular circumstances of this case, did not amount to a failure to respect any aspect of the claimant's private life within article 8.1."

33 Before this court the respondent argued that the appellant could not be said to have any reasonable expectation of privacy where he had willingly engaged in acts of disorder in a public street. Ms Higgins QC (who appeared for the appellant) countered this by submitting that reasonable expectation of privacy was not in general a prerequisite for the engagement of article 8 and certainly not in the case of a child or young person. Alternatively, she suggested that, at best, reasonable expectation was a factor to be taken into account. It was not to be treated as determinative of the issue whether the Convention right was engaged.

34 In *Campbell v MGN Ltd* [2004] 2 AC 457, para 20, Lord Nicholls of Birkenhead identified as "the initial question" in a claim that a person's article 8 rights had been violated by the publication of material about them, the issue "whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life". He then gave this warning in para 21:

"Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. *Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.* " (Emphasis supplied.)

35 In *Kinloch v HM Advocate* [2013] 2 AC 93 Lord Hope of Craighead DPSC took a similar approach. In that case the appellant complained that police had acted in breach of his article 8 rights in obtaining evidence by surveillance since they had failed to obtain authorisation for the surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000. He was accused of converting and transferring criminal property consisting of large sums of money. Police had covertly observed the appellant and his associates in various public places leaving premises, entering cars and carrying a bag which, when he was searched, was found to contain a large sum of money. At para 19 of his judgment Lord Hope DPSC acknowledged that there was a "zone of interaction" with others that, even in a public context, fell within the scope of private life but where "a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy" article 8 is not engaged.

36 Article 8 of ECHR is, arguably at least, the provision in ECHR with the broadest potential scope of application. How, after all, are limits to be set on the right to respect for one's private life, one's family life, one's home and one's correspondence? The *engagement* of the right, as opposed to justification of interference with it, must, of necessity, cover a wide field of an individual's activity. And the potential scope of application of the provision must vary according, not only to the conditions in which it is invoked, but also to the circumstances of the individual concerned. The concept of a reasonable expectation of a right to privacy, connoting, as it might seem to some, the notion that the individual concerned actually expected that his or her personal circumstances, on the occasion of the invasion of that privacy, ought to have been protected, and that that expectation was reasonable, is one to be approached with some caution, in my opinion, particularly in the case of children.

37 There is, at the least, a possible tension between the application of a reasonable expectation of privacy test and the well-established principle that any decision affecting a child should give prominence to his or her best interests. Moreover, an unduly rigorous use of the reasonable expectation test is impossible to reconcile with the breadth of possible application of article 8. As ECtHR said in *PG v United Kingdom* (2001) 46 EHRR 51, para 56:

"'Private life' is a broad term not susceptible to exhaustive definition ... Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'."

38 It is clear from the next paragraph of the Strasbourg court's judgment in *PG* that it did not consider that the reasonable expectation of privacy was a "touchstone" test of whether article 8 is engaged, if, by that expression one means that it is determinative of the issue. In para 57, the court said:

"There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's

home or private premises. *Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor* . A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of article 8, even where the information has not been gathered by any intrusive or covert method. The court has referred in this context to the Council of Europe's Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force on 1 October 1985 and whose purpose is: 'to secure in the territory of each party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him.' Such data being defined as 'any information relating to an identified or identifiable individual'." (Emphasis supplied.)

39 The italicised sentence in this passage clearly indicates that where someone engages in activities (such as public disorder) which are liable to be recorded or reported, what is reasonable to expect as to protection of his or her privacy is a factor to be taken into account in deciding whether article 8 is engaged but it will not automatically determine that issue. Other factors such as the use to which a photograph might be put or whether the individual concerned has objections to its publication are also relevant. Thus in *Reklos v Greece* (2009) 27 BHRC 420, photographs taken of a day-old infant constituted a breach of his article 8 rights because his parents objected to the taking of his photograph. At para 42 the court said:

"the court finds that it is not insignificant that the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them. Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue in the present case is not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents (see, mutatis mutandis , *PG v United Kingdom* 46 EHRR 51, para 57)."

40 The significance of taking and using a person's photograph, in the context of article 8, was emphasised by the court in para 40:

"A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to

> the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case ... obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image."

41 Prima facie, therefore, the taking and use of a photograph of an individual will lie within the ambit of article 8. The essential question is whether it is removed from that ambit because of the activity in which the person is engaged at the time the photograph was taken and because the person could not have a reasonable expectation that his or her right to respect for a private life arose in those particular circumstances. The fact that the activity in which the person is engaged is suspected to be criminal will not, by reason of that fact alone, be sufficient to remove it from the possible application of article 8.

42 In *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2010] 1 AC 410, this court held that disclosing criminal records during a Criminal Records Bureau check fell within article 8 because a person's private life could be affected by the stigma of having it revealed that he or she had criminal convictions. Although the appellant in that case had not been convicted of a criminal offence, in the course of making available to her employers the result of an enhanced criminal record certificate, the Secretary of State disclosed certain information which had been supplied by the police commissioner. This was to the effect that the appellant's son had been placed on the child protection register under the category of neglect. It was stated that the appellant had refused to co-operate with social services. This information caused her employers to discontinue her employment. After reviewing several Strasbourg authorities (including *X v Iceland* (1976) 5 DR 86; *Niemietz v Germany* (1992) 16 EHRR 97; *Sidabras and D*
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iautas v Lithuania (2004) 42 EHRR 6; *Rotaru v Romania* (2000) 8 BHRC 449; *Segerstedt-Wiberg v Sweden* (2006) 44 EHRR 2 and *Cemalettin Canl*
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v Turkey (Application No 22427/04) (unreported) given 18 November 2008), Lord Hope of Craighead DPSC, at para 27, said that this

> "line of authority from Strasbourg shows that information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of article 8.1, with the result that it will interfere with the applicant's private life when it is released."

43 If disclosure of a person's actual criminal convictions falls within the scope of article 8, it is difficult to see how publication of an image of someone, such as the appellant, who was photographed when it was suspected he was engaged in criminal activity, would not likewise come within its ambit.

44 In *Sciacca v Italy* (2005) 43 EHRR 20 ECtHR held that article 8 could be engaged by the publication of a person's photograph in newspapers even where they were under investigation for (and subsequently convicted of) criminal behaviour. In that case the applicant had been charged with criminal association, tax evasion and forgery of official documents. Revenue police compiled a file on her containing, among other things, her photographs and fingerprints. A public prosecutor held a press conference in which the allegations against the applicant and others were discussed. Photographs from the police file were supplied to

newspapers. Following this, two newspapers published the photographs of the applicant in articles which stated that she and others had been charged with serious offences. The case against the applicant ended with a special procedure for imposition of a penalty agreed between the applicant and the prosecution. The penalty involved the imposition of a term of imprisonment and a fine.

45 On the question of whether there had been an interference with Ms Sciacca's article 8 rights, the court said, at para 29:

> "Regarding whether there has been an interference, the court reiterates that the concept of private life includes elements relating to a person's right to their picture and that the publication of a photograph falls within the scope of private life. It has also given guidance regarding the scope of private life and it has found that there is: 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of a "private life"': *Von Hannover v Germany* (2004) 40 EHRR 1, paras 50–53. In the instant case the applicant's status as an 'ordinary person' enlarges the zone of interaction which may fall within the scope of private life, and the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection. Accordingly, the court concludes that there has been interference."

46 Of course, clear distinctions can be drawn between the *Sciacca* case and the present appeal. In that case it was not considered necessary, as it was here, to publish the applicant's photograph for the purpose of identifying her. Also, she was not engaged in criminal activity at the time the photograph was published. Moreover, it might be said that she had a reasonable expectation that a photograph taken as part of conventional police procedures would not be published without her consent. But the case is notable in the present context for its unqualified statement of principle that the publication of a photograph falls within the scope of a private life. Thus, while even a 14-year-old child might not have a reasonable expectation that his photograph would not be *taken* if he engaged in rioting in a public place, different considerations arise when it comes to the publication of the photograph.

47 The fact that the appellant was technically a child at the time of the publication of his photograph plays an important part in the decision whether that publication fell within the scope of his article 8 rights. The criminal justice system is geared to protect the identity of young offenders from disclosure. This is precisely to avoid the risks of criminalisation and stigmatisation. This is why such emphasis is placed by the police service and the prosecution service on youth conferences and other diversionary options. And it is why, if a child is involved in criminal proceedings, specific provision is made to ensure that his or her identity is not revealed. Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (SI 1998/1504) contains express provisions about the protection of a child's identity:

> "(1) Where a child is concerned in any criminal proceedings (other than proceedings to which paragraph 2 applies) the court may direct that— (a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and (b) no picture shall be published as being or including a picture of the child, except in so far (if at all) as may be permitted by the direction of the court.
>
> "(2) Where a child is concerned in any proceedings in a youth court or on appeal from a youth court (including proceedings by way of case stated)— (a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child;

and (b) no picture shall be published as being or including a picture of any child so concerned, except where the court or the [Department of Justice], if satisfied that it is in the interests of justice to do so, makes an order dispensing with these prohibitions to such extent as may be specified in the order.

"(3) If a court is satisfied that it is in the public interest to do so, it may, in relation to a child who has been found guilty of an offence, make an order dispensing with the prohibitions in paragraph 2 to such extent as may be specified in the order ..."

48 It does not lie easily with the scheme of protection of a child's identity envisaged by this provision that the publication of his photograph, for the very purpose of enabling those who know or recognise him to identify him in the course of criminal activity, should not fall within the scope of a Convention provision which guarantees his right to respect for a private life.

49 Moreover, as is common case, the nature and content of a child's right under article 8 must be informed by relevant international Treaty provisions. Article 3.1 of the United Nations Convention on the Rights of the Child ("UNCRC") provides that

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The United Nations Committee on the Rights of Children, in its *General Comment No 14* on the significance of this provision in May 2013 (CRC/C/GC/14), said this in para 1 of its report:

"Article 3, paragraph 1 of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and implementing all the rights of the child, and applies it [as] a dynamic concept that requires an assessment appropriate to the specific context."

And this at para 4:

"1. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child. The Committee has already pointed out that 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'. It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the 'child's best interests' and no right could be compromised by a negative interpretation of the child's best interests."

And, finally, this at para 5:

"The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity."

50 The notion that a child's best interests can be properly catered for by supposing that when he or she engages in criminal activity in a public place, because he or she cannot therefore have a reasonable expectation of privacy,

publication of his or her photograph, while engaged in that activity, does not come within the ambit of article 8 is, at best, incongruous, and is distinctly out of step with the philosophy which underpins article 3.1 of UNCRC. That philosophy, so far as it relates to criminal proceedings against children, is prominently proclaimed in article 40(2)(vii) of the Convention which requires states who are party to the Convention to ensure that the child's privacy is fully respected at all stages of the proceedings.

51 The Beijing Rules (the United Nations Standard Minimum Rules for the Administration of Justice) accord similar importance to the need to insulate children from the disclosure of their identity when they are involved in criminal proceedings. They were adopted by the General Assembly resolution 40/33 of 29 November 1985. Rule 8 provides:

> "8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> "8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."

52 The Commentary on this rule is to the following effect:

> "Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatisation. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'. Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle."

53 Taken as indicators as to how article 8 should be interpreted in this case, these provisions are reasonably unmistakable. A child's identity should be protected even (or, perhaps, especially) when he or she has been subject to criminal proceedings. The ambit of article 8 of ECHR must be seen as including within its embrace the need to protect a child from exposure as a criminal. That it should apply to the publication of a photograph of a child while, apparently, engaged in criminal activity, must follow inexorably. I consider, therefore, that there has been an interference with the appellant's article 8 right.

54 This conclusion does not depend on the abandonment of the test of reasonable expectation of privacy as a measure of whether a particular form of activity carried out in a public place comes within the ambit of article 8. In appropriate circumstances, this will be of considerable importance and its application to those circumstances may lead to only one possible conclusion such as, for instance, an adult person engaging in crime in a public forum. Such a person could not have a reasonable expectation of privacy for his criminal activity. As in *Kinloch v HM Advocate* [2013] 2 AC 93 he could not expect that police would not be entitled to carry out surveillance of his criminal behaviour. That consideration may occupy a position of such importance in the question of whether particular circumstances come within the ambit of article 8, that no other factor could outweigh it. But it is important to understand that reasonable expectation of privacy, as a test of whether article 8 is engaged, cannot be accorded a status of unique importance with that automatic consequence in every conceivable circumstance where it can be said that a reasonable expectation of privacy was not present.

55 The present case exemplifies the point. If reasonable expectation of privacy

was to be treated as the be all and end all of whether article 8 was engaged, it might be supposed that only one answer was possible. For the reasons that I have given, a more nuanced approach is warranted. The fact that the appellant was a child; the fact that the mooted interference with his article 8 right involved not only the taking of his photograph but also its publication, with the consequent risk of stigmatisation; and the fact that the consent of the appellant and his parents was neither sought nor given, combine to more than offset the importance of the reasonable expectation of privacy test in his case.

56 The test for whether article 8 is engaged is, essentially, a contextual one, involving not merely an examination of what it was reasonable for the person who asserts the right to expect, but also a myriad of other possible factors such as the age of the person involved; whether he or she has consented to publication; whether the publication is likely to criminalise or stigmatise the individual concerned; the context in which the activity portrayed in the publication took place; the use to which the published material is to be put; and any other circumstance peculiar to the particular conditions in which publication is proposed. To elevate reasonable expectation of privacy to a position of unique and inviolable influence is to exclude all such factors from consideration and I cannot accept that this is a proper approach. As I have said, reasonable expectation of privacy will often be a factor of considerable weight; it might even be described as "a rule of thumb" but to make it an inflexible, wholly determinative test is, in my opinion, to fundamentally misunderstand the proper approach to the application of article 8 and to unwarrantably proscribe the breadth of its possible scope.

57 *Von Hannover v Germany* (2004) 40 EHRR 1 is not authority for giving reasonable expectation of privacy this unique status. It is true that in para 51 of its judgment (quoted by Lord Toulson JSC in para 84) the court referred to the reasonable expectation of privacy *but this was for the purpose of making clear that where there was such an expectation, that was a factor in favour of the engagement of article 8* . The court did *not* suggest that, if there was no reasonable expectation of privacy, that would be determinative of the issue. Indeed, it did not even address that question. Moreover, the court's discussion in para 52 about the commission's reference to the use to which photographs might be put was quite separate from the question of whether there was a reasonable expectation of privacy. It is clear that the commission (and the court) considered that the dissemination of photographs to the general public could alone give rise to interference with the article 8 right, irrespective of whether there was a reasonable expectation of privacy. That approach is plainly inconsistent with the view that, unless there was such an expectation, there could never be an interference with article 8 rights.

58 In *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123, para 22, Laws LJ outlined what he described as three safeguards against the "overblown use of article 8". The second of these was that the touchstone for the engagement of the article was a reasonable expectation of privacy. Laws LJ said that, absent such an expectation, "there is no relevant interference with personal autonomy". His authority for this proposition appears to rest on *Von Hannover* , the opinions of Lord Nicholls and Lord Hope of Craighead in *Campbell v MGN Ltd* and the judgment of Sir Anthony Clarke MR in *Murray v Express Newspapers plc* [2009] Ch 481: see para 24 of Laws LJ's judgment.

59 For the reasons given earlier, I consider that *Von Hannover* does not support the proposition for which it was cited by Laws LJ. In relation to the opinions of Lord Nicholls and Lord Hope in *Campbell* , it is, I believe, significant that neither suggested, in quite the sweeping way that Laws LJ did, that reasonable expectation of privacy was a sine qua non of article 8 engagement.

Neither stated in terms that if a reasonable expectation of privacy was not present, there could never be an interference with personal autonomy. True it is that Lord Nicholls referred to reasonable expectation of privacy as the touchstone of private life but that is a far cry from saying that this is an indispensable criterion for the engagement of article 8. It is to be remembered that *Campbell* was a breach of confidence case. Such a case is more likely to give rise to consideration of what it was reasonable for the person who claimed that his or her article 8 rights had been infringed to expect. Moreover, too much can easily be read into the use of the word, "touchstone". Understood, as I suggest it should be, as an expression connoting no more than a means by which the significance of the material to be assessed is considered or as a form of litmus test, the mistake of treating it as an obligatory condition is revealed.

60 Laws LJ's reliance on the judgment of Sir Anthony Clarke MR in *Murray* does not take further the debate as to whether reasonable expectation of privacy is an essential prerequisite of article 8 engagement. It is clear that the Master of the Rolls conceived the reasonable expectation of privacy test as one to be applied in a broad and general way. He said [2009] Ch 481, para 36:

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

61 This passage does not partake of an approach which starts the inquiry into whether article 8 is engaged by asking, in a context-free way, whether there was a reasonable expectation of privacy. Rather, it commends an examination of all the circumstances of the case in order to determine whether such an expectation can be said to exist. This approach is echoed in the judgments of Lord Clarke and Lord Toulson JJSC in the present case. As I understand those judgments, it is suggested that considerations such as the age of the child, the circumstances in which the avowed interference took place, the purpose of the publication of photographs and whether consent had been obtained are relevant only in so far as they may be said to conduce to the overarching "touchstone" of a reasonable expectation of privacy. The reason for adopting such an approach is not explained other than by reference to earlier authority which, in turn, does not contain any analysis of why reasonable expectation of privacy should be given such unique and overweening status. There is certainly no obviously logical reason for approaching the question of engagement of article 8 in this way. The factors outlined earlier are unquestionably *capable* of bearing on the issue on a freestanding, autonomous footing and, absent any rational basis for treating them merely as a sub-set of reasonable expectation of privacy, this is how they should be evaluated.

62 I am therefore of the firm view that the reasonable expectation of privacy is but one of a number of factors which may be relevant to the issue of the engagement of article 8. That this is the correct approach is, it seems to me, clear from the judgment of Richards LJ in *R (C) v Comr of Police of the Metropolis (Liberty intervening)* [2012] 1 WLR 3007. Dealing with Laws LJ's judgment in *Wood* , Richards LJ said, at para 36:

> "What Laws LJ said about the taking of photographs on arrest was obviously obiter. More importantly, it relied on Strasbourg decisions prior to *S v United*

Kingdom which, as already explained, have to be reassessed in the light of the judgment in that case; and it was based on a test of 'reasonable expectation of privacy' which, as the recent Strasbourg cases show, is not the only or determinative factor. In *Campbell v MGN Ltd* [2004] 2 AC 457, para 21, Lord Nicholls of Birkenhead said, in relation to article 8.1, that 'essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. But that was plainly not the specific test applied by the Strasbourg court in *S v United Kingdom* ; and the judgment in *PG* 's case 46 EHRR 51, para 27 makes clear, that it is not the only test and that other considerations come into play, in particular, in relation to the retention of personal data ..."

63 *Kinloch* [2013] 2 AC 93 does not throw doubt on the correctness of Richards LJ's analysis. As it happens, and unsurprisingly, the patent lack of any reasonable expectation of privacy in that case was a weighty factor which militated strongly against a finding that article 8 was engaged but nothing in Lord Hope's judgment in that case lends support to the notion that that factor must in all circumstances be present for engagement of the article to arise. The criminalisation of a child's activities and his possible stigmatisation by publishing photographs of him while apparently engaged in such activities are factors which were not in play in *Kinloch* . But they are distinctly in play in this case. Surveillance was the complained of activity in *Kinloch* ; here it is the publication of photographs of the appellant which is in issue. That publication was, for reasons that I shall discuss below, justified. But it is extremely important not to conflate the question of justification with the issue of whether article 8 is engaged. It is wrong, in my judgment, to draw from cases such as *Kinloch* the notion that, because the occasion of possible interference involves the recording of what appears to be criminal activity, the subsequent use of that material can never engage article 8.

64 This point was clearly made by Lord Sumption JSC in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening)* [2015] AC 1065, para 4. In the passage which succeeds that quoted by Lord Toulson JSC at para 91, Lord Sumption JSC said this:

"In one sense [the reasonable expectation of privacy] test might be thought to be circular. It begs the question what is the 'privacy' which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."

65 When one focuses, as one must, on the publication of the photographs of the appellant, rather than the activity on which he was engaged, and when one recognises the potential effect that their publication might have on the life of the child that he then was, it is not difficult to understand that article 8 must be engaged. It would be facile to say that, because he was rioting, he cannot have expected that a right to respect for private life would be engaged and, on that

account alone, it was not engaged. A child's need for protection can go beyond what, if he was an adult, he would be reasonably entitled to expect.

66 Whether, therefore, one approaches the question of whether article 8 was engaged on the basis that reasonable expectation of privacy is but one factor in the equation or that that concept should be adjusted to take into account what the effect would be on the child, irrespective of his personal expectation, I am satisfied that there was an interference with his Convention right and that the essential issue in this case is whether that interference was justified.

Justification

67 Justification of interference with a qualified Convention right such as article 8 rests on three central propositions. The interference must be in accordance with law; it must pursue a legitimate aim; and it must be "necessary in a democratic society". Proportionality is a particular aspect of the last of these requirements.

68 The appellant takes no issue with the respondent's assertion that the interference with his article 8 right pursued a legitimate aim. It is claimed, however, that it was not in accordance with law and was not necessary in a democratic society.

69 As Sir Declan Morgan LCJ stated in para 32 of his judgment, section 32 of the Police (Northern Ireland) Act 2000 imposes a general duty on police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice. In light of its acknowledged responsibilities to children the police service devised Policy Directive 13/06 entitled *PSNI Policing with Children and Young People* . It aims to identify children and young people at risk of becoming involved in offending and works with partner agencies in the provision of support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules. Policy Directive 13/06 is available to the public.

70 Publication of the appellant's photograph was subject to the Data Protection Act 1998. The photograph of the appellant constituted "sensitive personal data" (section 2(g) of the Act) and its publication was "processing" of the data under section 1(1) of the Act. The police service is a registered data controller and must therefore comply with the data protection principles in relation to all personal data which it holds as data controller. Under section 29 of the Act, personal data is exempt from the first data protection principle, if processed for the purposes of the prevention and detection of crime and the apprehension and prosecution of offenders, except in so far as it required compliance with Schedule 2 and/or Schedule 3 to the Act. Since the processing related to sensitive personal data, the requirements of both Schedules were engaged. If any of the conditions in these Schedules was satisfied, the respondent is deemed to have acted in accordance with the Act. A condition common to both schedules is that the processing be necessary for the administration of justice. Plainly, this applies in the appellant's case. There was therefore no breach of the Data Protection legislation and I am satisfied that the publication of the appellant's photograph was in accordance with law.

Necessary in a democratic society

71 Clearly, the detection and prevention of crime, the prosecution and rendering to justice of those guilty of criminal offending and the diversion of young people from criminal activities, which may be said cumulatively to constitute the objective of the Operation Exposure campaign, are necessary in a democratic society. The essential question which arises under this rubric, therefore, is whether the devising and the application of the policy were

proportionate.

72 As Lord Wilson JSC in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 45 and Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 790, paras 72ff explained, this normally requires that four questions be addressed: (i) is the legislative objective sufficiently important to justify limiting a fundamental right?; (ii) are the measures which have been designed to meet it rationally connected to it?; (iii) are they no more than are necessary to accomplish it?; and (iv) do they strike a fair balance between the rights of the individual and the interests of the community?

73 The importance of detecting and prosecuting criminal offenders, the prevention of future crime and the diversion of young people from criminal activity are self-evidently objectives of the first order of importance. In concrete terms in this case, dealing with sectarian violence at interfaces in Derry, which showed alarming signs of persistence and escalation, was obviously a pressing police and community priority. This was reflected in the concerns expressed by community leaders in the meetings referred to in paras 13 and 14 above. There is no question therefore that the objective of Operation Exposure was sufficiently important to justify an interference with the article 8 right.

74 One must concentrate, therefore, on the three remaining questions to be answered, as outlined in Lord Wilson JSC's and Lord Reed JSC's analysis. First, is Operation Exposure rationally connected to the objective that it sought to achieve? A number of possible options were available to police as to how to deal with the sectarian violence that was taking place in 2009 and 2010. In his affidavit, Inspector Burrows explained why arresting individuals involved in rioting at the Fountain Street interface was extremely difficult. These reasons have not been challenged. In short summary, they were that police in full riot gear could easily be outrun by young rioters who would descend a grassy slope into the Bogside area of Derry as soon as any arrest operation at the scene was attempted. Pursuing them into this area and attempting to carry out arrests was almost certain to bring about further disorder and community disaffection. Deciding to identify young rioters after the rioting had ended and either prosecuting them or securing their co-operation on diversionary alternatives had an obviously rational connection with the objective of detecting crime, preventing further disorder and diverting young people from criminal activity. The rational connection between Operation Exposure and its objective is plainly established.

Are the measures no more than is necessary to achieve the objective?

75 In *Bank Mellat* Lord Reed JSC, in outlining the fourfold test of proportionality, followed the approach of Dickson CJ in the Canadian case *R v Oakes* [1986] 1 SCR 103. In expressing the third element of the test, he endorsed the approach that one should ask "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective".

76 The painstaking approach taken by the police service to the objective of identifying young offenders such as the appellant has been explained by Chief Inspector Yates and Superintendent Donaldson. Internal police inquiries were made; community leaders and social services were asked whether they could identify those involved; and it is ironical that the appellant and his father were shown the photograph that was later published. Had they identified the appellant, no publication would have occurred.

77 Plainly, some means of identifying those involved in the rioting had to be found. Sectarian violence at interfaces in Derry could not be allowed to continue. This not only put at risk vulnerable and elderly people living in the area, as well as

the young people involved in the violence themselves. It was corrosive of the good community relations in Derry which so many agencies are trying to promote. I am satisfied that publication of the photographs was, in this instance, truly a measure of last resort. I do not consider that a less intrusive means of achieving the objective of Operation Exposure was feasible. The third condition is satisfied, in my opinion.

A fair balance?

78 The final element in the proportionality examination is whether a fair balance has been struck between the rights of the individual and the interests of the community. The importance of the article 8 right and of the need to protect children and young persons from the risk of criminalisation and stigmatisation have been discussed above. The need for the decision-maker to be guided by the primary consideration of the best interests of the children has also been explained.

79 Striking the balance between the rights of the individual and the interests of the community should not, in this instance, be viewed solely as a competition between two opposing benefits. The appellant himself stood to gain by the opportunities afforded him to be diverted from the criminal activity in which he had been engaged. It was very much in his long term interests that he should become a law-abiding and useful member of his community.

80 The interests to the community generally are obvious. Quite apart from the deep unpleasantness and, indeed, danger to which those who lived in the area were subjected by these recurring riots, the peril in which they placed inter-community harmony is undeniable. The fact that the Operation was so successful in reducing the number of interface confrontations cannot be left out of account either. For these reasons and for the reasons given by Sir Declan Morgan LCJ in para 37 of his judgment, the balance fell firmly on the side of pursuing the option of publication of the appellant's photographs and those of others involved. The way in which he and others who were thus identified have been dealt with is testament to the benefit that was available to them by following that course. The benefit to the community is as unquestionable as it is considerable.

Disposal

81 I would dismiss the appeal.

LORD TOULSON JSC (with whom **LORD HODGE JSC** agreed)

82 I agree that this appeal should be dismissed but, unlike Lord Kerr of Tonaghmore JSC, I do not consider that the conduct of the police amounted, prima facie, to an interference with the appellant's right to respect for his private life, so as to fall within the scope of article 8 of the European Convention on Human Rights and Fundamental Freedoms.

83 Article 8.1 provides that "Everyone has the right to respect for his private and family life, his home and his correspondence".

84 In the leading case *Von Hannover v Germany* (2004) 40 EHRR 1, concerning press photographs of the applicant engaged in various informal activities with members of her family or friends in locations outside her own home, the Strasbourg court said, at paras 50–52:

> "50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see *Burghartz v Switzerland* (1994) 18 EHRR 101, para 24) or a person's picture (see *Schüssel v Austria* (Application No 42409/98) (unreported) given 21 February 2002).
>
> "Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by article 8 of the

Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings: see, mutatis mutandis, *Niemietz v Germany* (1992) 16 EHRR 97, para 29, and *Botta v Italy* (1998) 26 EHRR 241, para 32. There is therefore a zone of interaction with others, even in a public context, which may fall within the scope of 'private life': see, mutatis mutandis, *PG v United Kingdom* (2001) 46 EHRR 51, para 56, and *Peck v United Kingdom* (2003) 36 EHRR 41, para 57.

"51. The court has also indicated that, in certain circumstances, a person has a 'legitimate expectation' of protection and respect for his private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls': see *Halford v United Kingdom* (1997) 24 EHRR 523, para 45.

"52. As regards photos, with a view to defining the scope of protection afforded by article 8 against arbitrary interference by public authorities, the Commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public: see, mutatis mutandis, *Friedl v Austria* (1995) 21 EHRR 83, Friendly Settlement, Commission opinion, at paras 49–52; *PG v United Kingdom* 46 EHRR 51, para 58; and *Peck v United Kingdom* 36 EHRR 41, para 61."

85 This passage highlights three matters: the width of the concept of private life; the purpose of article 8, ie what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint. If so, it is then up to the defendant to justify the interference with the defendant's privacy.

86 In an impressive analysis of the scope of article 8, Laws LJ said in *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123:

"20. The phrase 'physical and psychological integrity' of a person (the *Von Hannover* case 40 EHRR 1, para 50; *S v United Kingdom* 48 EHRR 50, para 66) is with respect helpful. So is the person's 'physical and social identity': see *S v United Kingdom* , para 66 and other references there given. These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual ...

"21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the *Von Hannover* case 40 EHRR 1, para 50) between himself and others ...

"22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this

purpose I think that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8.1's engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8.1 may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8.2. I shall say a little in turn about these three antidotes to the overblown use of article 8."

87 I have set out this passage at length because I agree with it and cannot improve on it. We are concerned in this case with the second of Laws LJ's qualifications—the "touchstone" of whether the claimant enjoyed on the facts a "reasonable expectation of privacy" or "legitimate expectation of protection". (I take the expressions to be synonymous.) In support of that part of his analysis Laws LJ cited *Von Hannover v Germany* at para 51 (set out above), *Campbell v MGN Ltd* [2004] 2 AC 457 and *Murray v Express Newspapers plc* [2009] Ch 481.

88 In *Campbell's* case Lord Nicholls of Birkenhead said at para 21 that "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". He also warned that courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Applying *Campbell's* case, Sir Anthony Clarke MR said in *Murray's* case at para 35 that "The first question is whether there is a reasonable expectation of privacy". He said at para 36 that the question is a broad one which takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which the claimant was involved, the place at which it was happening, and the nature and purpose of the intrusion. The principled reason for the "touchstone" is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it is hard to see how there could nevertheless be a lack of respect for their article 8 rights.

89 More recent authorities to the same effect are *Kinloch v HM Advocate* [2013] 2 AC 93 and *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening)* [2015] AC 1065.

90 In *Kinloch's* case the police carried out covert surveillance of the applicant as part of a criminal investigation which led to his prosecution and conviction for laundering criminal property consisting of large sums of money. He complained that the form of surveillance and use of the resulting evidence at his trial involved a breach of his article 8 rights. Lord Hope of Craighead DPSC said in a judgment with which the other members of the court agreed:

"19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom* , 46 EHRR 51, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG v United Kingdom* , para

57.

"20. The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the person of criminal activity ...

"21. I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public ... The criminal nature of what he was doing, if that is what it was found to be, was not an aspect of his private life that he was entitled to keep private."

91 Citing *Campbell's* case and *Kinloch's* case, Lord Sumption JSC said in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] AC 1065, para 4:

"In common with other jurisdictions, including the European Court of Human Rights and the courts of the United States, Canada and New Zealand, the courts of the United Kingdom have adopted as the test for what constitutes 'private life' whether there was a reasonable expectation in the relevant respect."

92 Lord Kerr JSC considers that caution is needed in applying the "reasonable expectation of privacy" test especially in a case involving a child, where the test may be in tension with the principle that any decision should give prominence to the child's best interests.

93 Lord Kerr JSC draws attention to the observation of the Strasbourg court in *PG v United Kingdom* 46 EHRR 51, para 57:

"There are a number of elements relevant to a consideration of whether a person's private life may be concerned by measures effected outside a person's home or private premises. *Since* there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, *a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor* . A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene ... is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain." (Emphasis added.)

The court did not expand on its thinking in the second sentence of this passage. The linkage between the two halves of the sentence is intriguing but obscure. It may be that the court had in mind that a person may have a reasonable but mistaken expectation of privacy. Be that as it may, I have difficulty in reading the court as meaning to suggest that a situation may come within the scope of article 8 even where the person concerned had no reasonable expectation of privacy, and it is difficult to see why that should be so. It is perhaps unfortunate that the point was not developed, but the case pre-dated *Von Hannover* 40 EHRR 1, where the court referred to a "legitimate expectation" of protection, and the succeeding line of domestic authorities (including three decisions of the House of Lords or Supreme Court), which have adopted and applied the reasonable expectation test.

94 *Sciacca v Italy* (2005) 43 EHRR 20 was, as Lord Kerr JSC has explained at para 44, a case where the police released to the press a photograph taken of the applicant while under arrest. There is no difficulty is seeing that the applicant had a legitimate expectation that the police would not make use of her photograph in that way, but it is a very different question whether a member of a crowd

engaged in a violent disturbance in a public place has a legitimate expectation of protection from the police seeking the help of the public to identify those involved. In a footnote to the passage in para 29 of the court's judgment (set out by Lord Kerr JSC at para 45), the court cited paras 50–53 of the judgment in *Von Hannover* as the foundation of its observations. I have set out (at para 84) the relevant passage in *Von Hannover* , including the reference to a "legitimate expectation" of protection which is an important part of the guidance given by the court in that case. The court has not gone so far as to suggest that the taking or use of a photograph of a person is all circumstances an interference with a person's private life.

95 The fact that the appellant was a child at the relevant time is not in my opinion a reason for departing from the test whether there was a reasonable (or legitimate) expectation of privacy, but it is a potentially relevant factor in its application.

96 In the case of a child too young to have a sufficient appreciation of the idea of privacy there must obviously be some modification, but this caused no difficulty to the court in *Murray v Express Newspapers plc* [2009] Ch 481. Sir Anthony Clarke MR approved, at para 37, the approach taken by the trial judge, Patten J, who had said [2008] 1 FLR 704, para 23:

> "A proper consideration of the degree of protection to which a child is entitled under article 8 has ... to be considered in a wider context by taking into account not only the circumstances in which the photograph was taken and its actual impact on the child, but also the position of the child's parents and the way in which the child's life as part of that family has been conducted ... The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by the court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private. Ultimately it will be a matter of judgment for the court with every case depending upon its own facts. The point that needs to be emphasised is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing."

97 In considering whether, in a particular set of circumstances, a person had a reasonable expectation of privacy (or legitimate expectation of protection), it is necessary to focus both on the circumstances and on the underlying value or collection of values which article 8 is designed to protect.

98 I therefore do not agree with Lord Kerr JSC's suggestion (para 56) that the test of reasonable expectation of privacy (or legitimate expectation of protection), excludes from consideration such factors as the age of the person involved, the presence or absence of consent to publication, the context of the activity or the use to which the published material is to be put. The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke MR said in *Murray's* case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of

article 8, but the publication of the same photograph for another purpose might. Nor am I persuaded by Lord Kerr JSC's reading of *Von Hannover* (in para 57 of his judgment) that the commission and the court treated dissemination to the general public as a self-standing test.

99 The facts set out by Sir Declan Morgan LCJ at para 37 included the following:

> "(i) The violence at this [the Fountain Street/Bishop Street] interface was persistent, extending over a period of months, and was exposing vulnerable people to fear and the risk of injury. (ii) There was, therefore, a pressing need to take steps to bring it to an end by identifying and dealing with those responsible. (iii) Detection by arresting those at the scene was not feasible so use of photographic images was necessary. (iv) All reasonably practicable methods of identifying those involved short of publication of the photographs had been tried."

100 These facts have obvious relevance to the issue of justification, but it is also relevant to understand the nature of the activity in which the appellant was involved in considering whether the scope of article 8 extends to his claim (or, to use language familiar to lawyers, whether article 8 "is engaged"). When the authorities speak of a protected zone of interaction between a person and others, they are not referring to interaction in the form of public riot. That is not the kind of activity which article 8 exists to protect. In this respect the case is on all fours with *Kinloch v HM Advocate* [2013] 2 AC 93. Lord Hope DPSC's words, at para 21, are equally applicable to the appellant: "The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private." If, for example, members of the public gave descriptions of a rioter from which an artist prepared an indentikit, would its use by the police for the purpose of his identification be an infringement of his right to privacy? I consider not.

101 I should make it clear that I do not suggest that there could never be circumstances in which publication of the photographs which are the subject of this case could fall within the scope of the appellant's article 8 rights. Photographs can become historic and re-publication of material which was once properly in the public domain may give rise to a valid complaint. In *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] AC 1065 the court, applying the test of reasonable expectation of privacy, held that the systematic retention of personal details about a person on police files for a period of years was within the scope of article 8. But we are concerned with publication, in the recent aftermath of criminal activity, of photographs taken of public rioting for the purpose of identifying those involved. I agree with Higgins LJ that this situation is far removed from the values which article 8 was designed to protect.

102 The court was referred to the provisions of the Police (Northern Ireland) Act 2000 and the Justice (Northern Ireland) Act 2002. Under the Police Act 2000, section 32, it is the duty of the police to protect life and property; to preserve order; to prevent the commission of offences; and where an offence has been committed, to take measures to bring the offender to justice. Under the Justice Act 2002, section 53, it is the principal aim of the youth justice system to protect the public by preventing offending by children; all persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions; but all such persons and bodies must also have regard to the welfare of children with a view to furthering their personal, social and educational development. I do not consider that these

provisions affect the question whether the conduct of the police in releasing the CCTV images for publication was prima facie an interference with the appellant's right to respect for his private life.

103 If, contrary to my opinion, there was an interference by the police with the appellant's right to respect for his private life, I agree fully with Lord Kerr JSC that it was justified and there is nothing which I would wish to add on that issue.

LORD CLARKE OF STONE-CUM-EBONY JSC (with whom **LORD HODGE JSC** agreed)

104 The facts giving rise to this appeal are set out in detail by Lord Kerr of Tonaghmore JSC. I agree with Lord Kerr and Lord Toulson JJSC that this appeal must be dismissed on the basis that, if the facts fall within article 8.1 of the ECHR so that (as it is often put) article 8.1 is engaged, the conduct complained of was justified so that there was no breach of article 8 because of the provisions of article 8.2. Like Lord Toulson JSC, I do not wish to address the justification issue. However, I wish to add a short judgment on the question whether article 8.1 is engaged. I do so because Lord Kerr and Lord Toulson JJSC have reached different conclusions.

105 The question which divides them is whether article 8 is only engaged where the alleged victim has a legitimate expectation of privacy or a reasonable expectation of protection and respect for his private life. As Lord Toulson JSC shows at para 84, the latter expression was used by the European Court of Human Rights in the leading case *Von Hannover v Germany* (2004) 40 EHRR 1, para 51. The expression "reasonable expectation of privacy" is found in a number of English cases. I agree with Lord Toulson JSC that the two expressions have the same meaning. Subject to one point, I also agree with him that Laws LJ expressed the position correctly in *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123, paras 20–22, which he quotes at para 86. Laws LJ said at para 22 that the touchstone for the engagement of article 8.1 is whether the claimant enjoys on the facts a "reasonable expectation of privacy". Laws LJ went so far as to say that, absent such an expectation, there is no relevant interference with personal autonomy so as to engage article 8. As appears below, I would not go quite as far as that. As Lord Toulson JSC noted, Laws LJ cited para 51 of *Von Hannover* , together with two English cases, namely *Campbell v MGN Ltd* [2004] 2 AC 457 and *Murray v Express Newspapers plc* [2009] Ch 481. The more recent domestic cases cited by Lord Toulson JSC in paras 89–91, namely *Kinloch v HM Advocate* [2013] 2 AC 93 and *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening)* [2015] AC 1065, are to the same effect.

106 That is to my mind true in *Catt* even though, as Lord Kerr JSC says, at para 64, the whole passage in para 4 of Lord Sumption JSC's judgment reads as follows:

> "In common with other jurisdictions, including the European Court of Human Rights and the courts of the United States, Canada and New Zealand, the courts of the United Kingdom have adopted as the test for what constitutes 'private life' whether there was a reasonable expectation in the relevant respect: see *Campbell* ... para 21 (Lord Nicholls of Birkenhead) and *Kinloch* ... paras 19–21 (Lord Hope of Craighead DPSC). In one sense this test might be thought to be circular. It begs the question what is the 'privacy' which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every

occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."

Lord Sumption JSC was not suggesting that any test other than the legitimate expectation of privacy might be appropriate.

107 All the domestic cases support the proposition that, as Lord Nicholls put it, the touchstone of private life is whether the person in question had a reasonable expectation of privacy or, as Lord Sumption JSC put it in *Catt* , the test for what constitutes private life is whether there was a reasonable expectation in the relevant respect.

108 Lord Kerr JSC places some reliance on para 36 of the judgment of Richards LJ in *R (C) v Comr of Police of the Metropolis (Liberty intervening)* [2012] 1 WLR 3007 as follows:

"What Laws LJ said [in *Wood*] about the taking of photographs on arrest was obviously obiter. More importantly, it relied on Strasbourg decisions prior to *S v United Kingdom* [(2008) 48 EHRR 50] which, as already explained, have to be re-assessed in the light of the judgment in that case; and it was based on a test of 'reasonable expectation of privacy' which, as the recent Strasbourg cases show, is not the only or determinative factor. In *Campbell v MGN Ltd* [2004] 2 AC 457, para 21, Lord Nicholls of Birkenhead said, in relation to article 8.1, that 'essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. But that was plainly not the specific test applied by the Strasbourg court in *S v United Kingdom* ; and the judgment in *PG* 's case 46 EHRR 51 makes clear, at para 57, that it is not the only test and that other considerations come into play, in particular, in relation to the retention of personal data ..."

109 It is true that in *S v United Kingdom* (2008) 48 EHRR 50 the court does not expressly refer to the reasonable expectation of privacy but its analysis seems to me to be consistent with it. It is also true that in *PG* 46 EHRR 51, para 57 the court said that a person's expectations may be a significant, although not necessarily a conclusive, factor. I cannot at present think of a situation where article 8.1 would be engaged in the absence of a reasonable expectation of privacy or a reasonable expectation of protection and respect for the private life of the applicant. It is difficult to see why article 8.1 should be engaged where the applicant has no reasonable expectation of privacy. It is important in this respect to have regard to the fact that the concept of reasonable expectation is a broad objective concept and that the court is not concerned with the subjective expectation of the person concerned, whether that person is a child or an adult.

110 As Laws LJ put it in *Wood* [2010] 1 WLR 123, para 22 absent a reasonable expectation of privacy, there is no relevant interference with personal autonomy, which (as he explains in para 21) is a central feature of article 8. Although, in the light of the present state of the Strasbourg jurisprudence, I for my part would not go so far as to say that such a case is impossible, the test of reasonable expectation is in my opinion relevant in this class of case.

111 I agree with Lord Toulson JSC that *Kinloch* [2013] 2 AC 93 is a case of some significance on the facts here. In para 90 he sets out the facts and relies on

paras 19–21 of Lord Hope DPSC's judgment in this court. The complaint was that the form of surveillance and the use of the resulting evidence involved a breach of the applicant's article 8 rights. Lord Hope DPSC said:

> "19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom* ... para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG v United Kingdom* , para 57 ...
>
> "20. The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the person of criminal activity ...
>
> "21. I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public ... The criminal nature of what he was doing, if that is what it was found to be, was not an aspect of his private life that he was entitled to keep private."

112 I agree with Lord Toulson JSC that on the facts here the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation that such photographs, taken for the limited purpose of identifying who he was, would not be published. I would not however hold that the mere fact that a person is photographed in the course of a criminal activity deprives him or her from the right to prevent the police from publishing the photographs. Thus, if the photographs had been published for some reason other than identification, the position would have been different and might well have engaged his rights to respect for his private life within article 8.1. I would not therefore put the point quite as broadly as Lord Hope DPSC does in para 21 of *Kinloch* quoted above.

113 I respectfully differ from Lord Kerr JSC in so far as he distinguishes the position of a child. I adhere to the views I expressed in *Murray's* case [2009] Ch 481 to which Lord Toulson JSC refers at paras 88, 96 and 98. As ever, all depends on the circumstances of the case and, in the case of a child, the context is of particular importance. So, for example, the attributes of the child, the nature of the activity in which he or she was involved, the place where the activity was happening and the nature and purpose of the intrusion complained of are all relevant factors. I do not think that any of the decisions of the European Court of Human Rights to which we were referred leads to any other conclusion, although I accept that it does not always refer to the reasonable expectation point.

114 As Lord Toulson JSC says, at para 96, in *Murray* the Court of Appeal (comprising Laws, Thomas LJJ and myself) approved the approach of Patten J at first instance so far as a child is concerned. I remain of that view today. All the factors identified by Patten J as quoted by Lord Toulson JSC are relevant or potentially relevant in considering whether article 8.1 is engaged in a particular case. Thus I agree with Lord Toulson JSC, at para 98, that the age of the person involved, the presence or absence of consent to publication, the context of the activity and the use to which the relevant material is put are all relevant. The law is to be applied broadly, taking account of all the circumstances of the case. In Lord Steyn's famous phrase, in law context is everything.

115 In the instant case, for the reasons given by Lord Toulson JSC, at paras 100–102, I agree with him that the test is not satisfied on the facts of this case, which involves the publication, in the recent aftermath of criminal activity, of photographs taken of public rioting for the purpose of identifying those involved. I reach that conclusion having regard to all the circumstances of the case, including the fact that the appellant was 14 at the material time.

Appeal dismissed.

DIANA PROCTER, Barrister

Footnotes

1 Human Rights Act 1998, Sch 1, Pt I, art 8.1: see post, para 83 . Art 8.2: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ... , for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

[433 US 425]

RICHARD M. NIXON, Appellant,

v

ADMINISTRATOR OF GENERAL SERVICES et al.

433 US 425, 53 L Ed 2d 867, 97 S Ct 2777

[No. 75–1605]

Argued April 20, 1977. Decided June 28, 1977.

SUMMARY

The day after President Ford signed the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note) into law, former President Nixon instituted an action in the United States District Court for the District of Columbia, invoking its exclusive jurisdiction under the Act to entertain actions challenging the Act's constitutionality. The Act provides, in general, that the Administrator of General Services shall take custody of former President Nixon's papers and tape recordings, and shall promulgate regulations for public access to such materials (not yet effective), subject to screening of the materials by government archivists to return private papers to Mr. Nixon. A three-judge District Court held that the Act's provisions for taking custody of Mr. Nixon's Presidential materials, and for screening of the materials by government archivists, did not violate (1) separation of powers principles, (2) the Presidential privilege of confidentiality, (3) Mr. Nixon's privacy or First Amendment rights, or (4) the bill of attainder clause of the Constitution (Art I, § 9, cl 3) (408 F Supp 321).

On direct appeal, the United States Supreme Court affirmed. In an opinion by BRENNAN, J., joined by STEWART, MARSHALL, and STEVENS, JJ., and joined in part by WHITE (holdings 1–4 below), POWELL (holdings 4 and 5), and BLACKMUN (holding 5), JJ., it was held that (1) the Act's provisions requiring the Administrator of General Services to take the materials into the government's custody, subject to screening by government archivists, did not constitute an impermissible interference by the Legislative Branch with matters inherently the business solely of the Executive Branch, in violation of separation of powers principles, since (a) such claim was not supported by either President Ford, who signed the bill into law, or President Carter, who, through the Solicitor General, supported the Act's constitutionality in

SUBJECT OF ANNOTATION

Beginning on page 1273, infra

Supreme Court's views as to what constitutes a bill of attainder prohibited by Federal Constitution

Briefs of Counsel, p 1265, infra.

the case at bar, (b) the control of the materials remained in the Executive Branch, the Administrator and the archivists being Executive Branch employees, (c) the Act did not make the materials available to the Congress, except insofar as the public in general might become entitled to access, and (d) the Act was designed to ensure that the materials could be released only when release was not barred by some applicable privilege inherent in the Executive Branch; (2) the Act, on its face, did not violate the privilege of confidentiality of Presidential communications, since (a) the screening constituted a very limited intrusion by Executive Branch personnel sensitive to executive concerns, the archivists having performed the identical task as to the libraries of other former Presidents without any suggestion that such activity had interfered with executive confidentiality, (b) the limited intrusion into executive confidentiality was justified by Congress' purposes of preserving an accurate record for legitimate historical and governmental purposes, of making the materials available for the on-going conduct of Presidential policy, and of restoring public confidence in political processes by preserving the materials as a source for facilitating a full airing of the events leading to Mr. Nixon's resignation, and (c) the nature of the materials as intermingling communications relating to governmental duties with private and confidential communications required comprehensive review if Congress' objectives were to be furthered; (3) the Act did not violate Mr. Nixon's legitimate expectation of privacy in his personal communications, guaranteed by the Federal Constitution, particularly the Fourth Amendment's prohibition of general searches, since the Act was required to be viewed in the context of (a) the limited intrusion of the screening process, (b) Mr. Nixon's status as a public figure, (c) his lack of any expectation of privacy in the overwhelming majority of the materials, which pertained predominantly to the official conduct of his Presidency, (d) the important public interest in preservation of the materials, (e) the virtual impossibility of segregating the small quantity of private materials without comprehensive screening, (f) the Act's sensitivity to Mr. Nixon's legitimate privacy interests, (g) the unblemished record of the archivists for discretion, and (h) the likelihood that the regulations to be promulgated by the Administrator would further moot Mr. Nixon's fears that his materials would be reviewed by "a host of persons"; (4) the Act was not unconstitutional as substantially interfering with or chilling Mr. Nixon's, or future Presidents', First Amendment rights of associational privacy and political speech, since (a) only a fraction of the materials involved political activities so as to raise a First Amendment claim, (b) the extent of any burden on First Amendment rights by the archival screening was speculative in light of the Act's provisions protecting Mr. Nixon from improper public disclosures and guaranteeing him full judicial review before any public access was permitted, and (c) the First Amendment claim was clearly outweighed by the important governmental interests promoted by the Act; and (5) the Act did not constitute a bill of attainder proscribed by the Constitution, since (a) Mr. Nixon constituted a legitimate class of one, the Presidential papers of other former Presidents already being housed in functioning Presidential libraries, and the Act (which was accompanied by other statutory provisions establishing a special commission to study and recommend appropriate legislation for the

preservation of the records of future Presidents and all other federal officials, 44 USCS §§ 3315–3324) having been passed for preservation of Mr. Nixon's records after he had entered into a depository agreement with the Administrator which would have allowed destruction of certain of the materials, and (b) in any event, the Act did not inflict forbidden legislative "punishment" as resting upon a congressional determination of Mr. Nixon's blameworthiness and a desire to punish him, but instead, as indicated by the legislative history and the Act's specific provisions protecting Mr. Nixon's interests, constituted nonpunitive legislative policymaking, justified by the need to preserve information needed to complete prosecutions of Watergate-related crimes, and by the need to protect the public interest in access to materials of general historical interest.

STEVENS, J., concurring, expressed the view that (1) for purposes of the bill of attainder clause, Mr. Nixon constituted a legitimate class of one, since unlike any other President, Mr. Nixon had resigned his office under unique circumstances, and had accepted a pardon for offenses committed while in office, and (2) the decision in the case at bar should not be considered as precedent for future legislation which related not to the Office of President, but to one of its occupants.

WHITE, J., concurring in part and concurring in the judgment, expressed the view that (1) the Act did not impose "punishment" and thus was not a bill of attainder, and (2) the Act should be construed as requiring the return to Mr. Nixon of all purely private materials, regardless of whether or not such materials were of historic interest.

BLACKMUN, J., concurred in part and concurred in the judgment, expressing the view that (1) President Carter's submission, made through the Solicitor General, that the Act served rather than hindered the President's functions, although significant, was not dispositive of the separation of powers issues (as Powell, J., would hold), and (2) the Act should not become a model for the disposition of the papers of each President who left office at a time when his successor or the Congress was not of his political persuasion.

POWELL, J., concurring in part and concurring in the judgment, expressed the view that (1) in judging the facial validity of the Act, it had to be assumed that the Administrator's regulations would give full protection to the constitutional and legal rights of Mr. Nixon and others, and (2) the Act's provisions for retention and screening of the materials were not facially unconstitutional (the constitutionality of implementing regulations not being before the court) as violative of the principle of separation of powers or of the Presidential privilege deriving therefrom, since it was dispositive in the unique circumstances of the case that President Carter had represented to the court, through the Solicitor General, that the Act served rather than hindered the President's constitutional functions—it not being within the court's province to reject the views of the incumbent President, who alone could speak for the Executive Branch.

BURGER, Ch. J., dissenting, expressed the view that (1) the Act violated the constitutional principle of separation of powers, since (a) Congress could not compel or coerce the President in matters relating to the operation and conduct of his office, (b) the Act was an exercise of executive, not legislative, power by the Legislative Branch, (c) the Act violated the constitutional privilege and historical practice of confidentiality of the Presidency, (d) to preserve the constitutionally rooted independence of each branch of government, each branch must be able to control its own papers, (e) to ensure institutional integrity and confidentiality, Presidents and their advisers must have assurance, as did judges and members of Congress, that their internal communications would not become subject to retroactive legislation mandating intrusions into matters as to which there was a well-founded expectation of privacy when the communications took place, and (f) the fact that an incumbent President signed or supported a particular measure could not defeat a former President's claim of privilege; (2) the Act violated Mr. Nixon's privacy rights in political and personal communications under the First and Fourth Amendments, since such privacy interests outweighed the governmental interests, asserted as justification for the Act, in ensuring the general efficiency of the Executive Branch's operations and in preserving historically significant papers and tape recordings for posterity; and (3) the Act violated the bill of attainder clause of the Constitution, since it applied only to one former President, not all Presidents, and since it deprived him of the established property right of the President in the control of his Presidential papers and of the right of a former President to have a Presidential Library at a facility of his own choosing for the deposit of such Presidential papers as he unilaterally selected, retributive motives on the part of Congress being irrelevant to bill-of-attainder analysis, and Mr. Nixon's "uniqueness" because of his resignation and acceptance of a pardon not justifying the Act.

REHNQUIST, J., dissented on the ground that the Act was unconstitutional as violating the principle of separation of powers, since (1) candid discourse among the President, his advisors, foreign heads of state, Ambassadors, members of Congress, and others who dealt with the White House on a sensitive basis was an absolute prerequisite to the effective discharge of the duties of the President, (2) the effect of the Act, even though facially limited to former President Nixon, and of the precedential effect of the court's decision, would restrain the necessary free flow of information to and from present and future Presidents, and (3) such substantial intrusion upon effective discharge of the duties of the President violated the principle of separation of powers, it not being proper to sustain the Act by "balancing" the intrusion against the interests assertedly fostered by the Act.

NIXON v ADMINISTRATOR OF GENERAL SERVICES

433 US 425, 53 L Ed 2d 867, 97 S Ct 2777

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

United States § 21 — Nixon papers statute — duty of Administrator of General Services

1. Under the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which directs the Administrator of General Services to take custody of the papers and tape recordings of former President Nixon, and which requires the Administrator to promulgate regulations (1) providing for the processing of such materials for the purpose of returning to Mr. Nixon those materials that are personal and private in nature, and (2) determining the terms and conditions upon which public access

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16 Am Jur 2d, Constitutional Law §§ 210, 231, 233, 328, 341, 353, 411, 412; 62 Am Jur 2d, Privacy §§ 16, 18, 42; 77 Am Jur 2d, United States §§ 42, 45

20 Am Jur Pl & Pr Forms (Rev Ed), Privacy, Forms 92, 101

44 USCS § 2107, note; Constitution, Article I, Section 9, Clause 3, 1st and 14th Amendments

US L Ed Digest, Attainder and Outlawry § 4; Constitutional Law §§ 72, 101, 935.5, 940; United States § 22

ALR Digests, Attainder and Outlawry § 1; Constitutional Law §§ 112.5, 145, 795, 803; United States § 2

L Ed Index to Annos, Attainder; Freedom of Speech, Press, Religion, and Assembly; President of the United States; Privacy; Privileged Communications; Separation of Powers

ALR Quick Index, Attainder and Outlawry; Freedom of Speech and Press; President; Privacy; Privileged Communications; Separation of Powers

Federal Quick Index, Bills of Attainder; Freedom of Association; Freedom of Speech and Press; President of the United States; Privacy; Privileged Communications; Separation of Governmental Powers

ANNOTATION REFERENCES

Supreme Court's views as to what constitutes a bill of attainder prohibited by Federal Constitution. 53 L Ed 2d 1273.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

The Supreme Court and the First Amendment right of association. 33 L Ed 2d 865.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Governmental privilege against disclosure of official information in a federal court. 95 L Ed 425, 97 L Ed 735.

Executive privilege with respect to Presidential papers and recordings. 19 ALR Fed 472.

Waiver or loss of right of privacy. 57 ALR3d 16.

to retained materials may eventually be afforded—the Administrator, in designing the regulations, must consider the need to protect the constitutional rights of Mr. Nixon and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained.

Appeal and Error § 1340 — District Court decision — scope of review by Supreme Court

2. On review of a three-judge Federal District Court's decision upholding the constitutionality of the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which directs the Administrator of General Services to take custody of the papers and tape recordings of former President Nixon, and which requires the Administrator to promulgate regulations (1) providing for the processing of such materials for the purpose of returning to Mr. Nixon those materials that are personal and private in nature, and (2) determining the terms and conditions upon which public access to retained materials may eventually be afforded—the United States Supreme Court, like the District Court, will limit its consideration of the merits of Mr. Nixon's constitutional claims to those addressing the facial validity of the provisions of the Act requiring the Administrator to take the materials into the government's custody subject to screening by government archivists to return private papers to Mr. Nixon, and will not consider claims relating to regulations governing public access to retained materials, where no such regulations had yet become effective.

Constitutional Law § 68.5; United States § 22 — separation of powers — Presidential privilege — Nixon papers statute

3. The right to assert claims that a federal statute is unconstitutional as a violation of separation of powers and the Presidential privilege of confidentiality is not restricted to only an incumbent President, and thus former President Nixon may assert such claims as to the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note), which was the product of joint action by Congress and President Ford after Mr. Nixon's resignation as President, and which, in general, directs the Administrator of General Services to assume custody and control of the Presidential papers and tape recordings of Mr. Nixon.

Constitutional Law § 72 — separation of powers — Nixon papers statute

4. The Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note), which directs the Administrator of General Services to take custody of the papers and tape recordings of former President Nixon, and which requires the Administrator to promulgate regulations (a) providing for the processing of such materials for the purpose of returning to Mr. Nixon those materials that are personal and private in nature, and (b) determining the terms and conditions upon which public access to retained materials may eventually be afforded, does not on its face—with regard to its provisions requiring the Administrator to take the materials into the government's custody, subject to screening by government archivists to return private papers to Mr. Nixon—constitute an impermissible interference by the Legislative Branch with matters inherently the business solely of the Executive Branch in violation of separation of powers principles, since (1) neither President Ford nor President Carter supported the claim, President Ford having signed the Act into law and President Carter's administration, through the Solicitor General, having supported the Act's constitutionality in the case at bar, (2) the control over the materials remained in the Executive Branch, the Administrator and the archivists being Executive Branch employees, (3) the Act does not make the materials available to the Congress, except insofar as the public in general may be entitled to access, and (4) the Act is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in the Executive Branch. (Burger, Ch. J., and Rehnquist, J., dissented from this holding.)

Constitutional Law § 68.5 — separation of powers

5. The principle of separation of powers does not require three airtight departments of the government.

Constitutional Law § 72 — separation of powers — Nixon papers statute

6. In determining whether the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take former President Nixon's papers and tape recordings into the government's custody, subject to screening by government archivists to return materials that are personal and private in nature to Mr. Nixon—disrupts the proper balance between coordinate branches of government in violation of separation of powers principles, the proper inquiry focuses on the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions; only where the potential for disruption is present must it be determined whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

United States § 22 — Nixon papers statute — rights and privileges

7a, 7b. Under the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to (1) take former President Nixon's papers and tape recordings into the government's custody, subject to screening by government archivists for returning private materials to Mr. Nixon, and (2) promulgate regulations to govern ultimate public access to retained materials—meaningful notice must be given to Mr. Nixon of archival decisions that might bring into play rights secured by the Act's provisions recognizing the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege.

United States § 21 — Nixon papers — legal title — regulation

8a, 8b. Even if it is considered that former President Nixon has legal title to his papers and tape recordings, nevertheless such materials are not thereby immune from regulation; regardless of where legal title lies, from the nature of the public service, or the character of documents embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government to give them publicity, even against the will of the writer; such principle extends beyond materials concerning national security and current government business to embrace historical information.

United States §§ 21, 22 — Nixon papers statute — private materials — legal title

9a, 9b. Even if legal title to former President Nixon's papers and tape recordings is considered to rest in the government, Mr. Nixon is not thereby foreclosed from asserting under the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note) a claim for return of private materials retained by the Administrator of General Services under the Act in contravention of Mr. Nixon's rights and privileges as specified in the Act.

United States § 22 — Presidential privilege — Nixon papers statute

10a, 10b, 10c. The Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note), which directs the Administrator of General Services to take custody of the papers and tape recordings of former President Nixon, and which requires the Administrator to promulgate regulations (a) providing for the processing of such materials for the purpose of returning to Mr. Nixon those materials that are personal and private in nature, and (b) determining the terms and conditions upon which public access to retained materials may eventually be afforded, does not on its face—with regard to its provisions relating to scrutiny of the materials by government archivists in order to screen out private materials for return to Mr. Nixon—violate

the privilege of confidentiality of Presidential communications, since (1) the screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns, the archivists having performed the identical task as to the libraries of certain other former Presidents without any suggestion that such activity had in any way interfered with executive confidentiality, (2) the limited intrusion into executive confidentiality was justified by Congress' purposes of preserving an accurate record for legitimate historical and governmental purposes, of making the materials available for the on-going conduct of Presidential policy, and of restoring public confidence in political processes by preserving the materials as a source for facilitating a full airing of the events leading to Mr. Nixon's resignation, and (3) the nature of the materials as intermingling communications relating to governmental duties with private and confidential communications required comprehensive review if Congress' objectives were to be furthered; given the safeguards built into the Act to prevent disclosure of private materials and materials implicating Presidential confidentiality, and given the minimal nature of the intrusion into Presidential confidentiality, Mr. Nixon's claims of Presidential privilege must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful government and historical purposes. (Burger, Ch. J., and Rehnquist, J., dissented from this holding.)

United States § 22 — Presidential privilege

11. The privilege of confidentiality of Presidential communications is a qualified one.

United States § 22 — Presidential privilege

12. The privilege of confidentiality of Presidential communications is necessary to provide the confidentiality required for the President's conduct of office, enabling him to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends; the confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the President's benefit as an individual, but for the benefit of the Republic, and therefore the privilege survives the individual President's tenure.

Evidence § 248 — presumption — needs of Executive Branch

13. It must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch.

United States § 22 — scope of Presidential privilege

14. The Presidential privilege of confidentiality of communications is limited to communications made in the performance of a President's responsibilities of his office and made in the process of shaping policies and making decisions.

United States § 22 — Presidential privilege — Nixon papers statute

15. With regard to the Presidential privilege of confidentiality of communications an absolute barrier to all outside disclosure of Presidential records is not practically or constitutionally necessary under the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note), which, in general, directs the Administrator of General Services to assume custody and control of the Presidential papers and tape recordings of former President Nixon—the expectation of the confidentiality of executive communications being limited and subject to erosion over time after an administration leaves office.

United States § 21 — Nixon papers statute — interpretation

16a, 16b. With regard to the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which, in general, directs the Administrator of

General Services to assume custody and control of the Presidential papers and tape recordings of former President Nixon—the provision of the Act stating that any agency or department in the Executive Branch shall have access to the materials "for lawful Government use," requires that once Mr. Nixon is notified of requested access by an executive official, Mr. Nixon must be allowed to assert any constitutional right or privilege that in his view would bar access.

United States § 17 — power of Congress — regulation of Presidential papers

17. With regard to the availability of a former President's records to an incumbent President seeking access to materials concerning past decisions that define or channel current governmental obligations, and with regard to the availability of such records as concerns the American people's ability to reconstruct and come to terms with their history, Congress can legitimately act to rectify the hit-or-miss approach which characterizes past attempts to protect such substantial interests, by entrusting the materials to expert handling by trusted and disinterested professionals.

Evidence § 248 — presumption — performance of administrative duties

18. With regard to the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of the papers and tape recordings of former President Nixon, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—the United States Supreme Court must presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act.

Constitutional Law § 101; Search and Seizure § 8 — right of privacy — Nixon papers statute

19a, 19b. The Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of former President Nixon's papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—does not violate Mr. Nixon's legitimate expectation of privacy in his personal communications, guaranteed by the Federal Constitution, particularly the Fourth Amendment's prohibition of general searches, since the constitutionality of the Act must be viewed in the context of (1) the limited intrusion of the screening process, (2) Mr. Nixon's status as a public figure, (3) his lack of any expectation of privacy in the overwhelming majority of the materials, which pertained predominantly to the official conduct of his Presidency, (4) the important public interest in preservation of the materials, (5) the virtual impossibility of segregating the small quantity of private materials without comprehensive screening, (6) the Act's sensitivity to Mr. Nixon's legitimate privacy interests, (7) the unblemished record of the archivists for discretion, and (8) the likelihood that the regulations to be promulgated by the Administrator will further moot Mr. Nixon's fears that his materials will be reviewed by "a host of persons." (Burger, Ch. J., dissented from this holding.)

Constitutional Law § 101 — privacy interests — Presidential papers

20a, 20b. Even if prior Presidents have declined to assert their privacy interests in their Presidential papers, their failure to do so does not necessarily bind a subsequent President, since privacy interests are not solely dependent for their constitutional protection upon established practice of governmental toleration.

Constitutional Law § 101 — right of privacy — Nixon papers statute

21. With regard to former President Nixon's claim that his constitutional right of privacy is violated by the Presidential Recordings and Materials Preser-

vation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of Mr. Nixon's Presidential papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—the merits of Mr. Nixon's claim cannot be considered in the abstract, but instead must be considered in light of the provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the materials to archival screening.

Search and Seizure § 25 — warrant requirement — right of privacy — Nixon papers statute

22a–22d. With regard to former President Nixon's claim that his right of privacy, protected by the Fourth Amendment, is violated by the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of Mr. Nixon's Presidential papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—the Fourth Amendment's warrant requirement is not applicable, since Mr. Nixon's claim deals not with standards governing a generalized right to search by law enforcement officials or other government personnel, but with a particularized legislative judgment, supplemented by judicial review, similar to condemnation under the power of eminent domain, that certain materials are of value to the public.

Constitutional Law § 101 — right of privacy — Nixon papers statute

23. With regard to former President Nixon's claim that his constitutional right of privacy is violated by the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of Mr. Nixon's Presidential papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—Mr. Nixon cannot assert any privacy claim as to documents and tape recordings that he has already disclosed to the public.

Constitutional Law §§ 935.5, 940 — freedom of political speech and association — Nixon papers statute

24. The Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of former President Nixon's papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—is not unconstitutional as substantially interfering with or chilling Mr. Nixon's First Amendment rights of associational privacy and political speech, since (1) only a fraction of the materials involved political activities so as to raise a First Amendment claim, (2) the extent of any burden on First Amendment rights by the archival screening was speculative in light of provisions of the Act protecting Mr. Nixon from improper public disclosures and guaranteeing him full judicial review before any public access is permitted, and (3) the First Amendment claim was clearly outweighed by the important governmental interests promoted by the Act; for the same reasons, the Act's scheme for custody and archival screening of the materials is not invalid as inhibiting the freedom of political activity of future Presidents, it being significant that such concern did not deter President Ford from signing the Act into law, or President Carter from urging affirmance of a Federal District Court's judgment upholding the Act's constitutionality. (Burger, Ch. J., dissented from this holding.)

Constitutional Law § 935.5 — First Amendment — political activities

25. Involvement in partisan politics is closely protected by the First Amendment, and compelled disclosure in relation thereto in itself can seriously infringe on privacy and belief guaranteed

by the First Amendment; however, a compelling public need that cannot be met in a less restrictive way will override those interests, particularly when the free functioning of national institutions is involved.

Attainder and Outlawry § 4 — bill of attainder — Nixon papers statute

26a, 26b. The Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of former President Nixon's papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—does not constitute a bill of attainder proscribed by Article I, § 9, cl 3, of the Constitution, since (1) Mr. Nixon constituted a legitimate class of one, (a) the Presidential papers of other former Presidents already being housed in functioning Presidential libraries, (b) the Act having been passed for preservation of Mr. Nixon's papers and tapes after he had entered into a depository agreement with the Administrator which would have allowed destruction of certain of the materials, and (c) Congress, upon passing the Act, having also established a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials (44 USCS §§ 3315–3324), and (2) in any event, the Act did not inflict forbidden legislative "punishment" as resting upon a congressional determination of Mr. Nixon's blameworthiness and a desire to punish him, but instead constituted nonpunitive legislative policymaking, (a) the Act making provision for an award of just compensation to Mr. Nixon for any confiscation of any property belonging to him, (b) the Act being justified by the need, in the face of the depository agreement, to preserve information needed to complete prosecutions of Watergate-related crimes, and by the need to protect the public interest in access to materials of general historical interest, (c) there being no indication that Congress intended to punish Mr. Nixon for alleged wrongdoings, it appearing instead that Congress acted to preserve the availability of judicial evidence and historically relevant materials, (d) the claim that the Act was a punitive measure being belied by the Act's specific provisions which safeguard Mr. Nixon's access to the materials, direct compensation for confiscation of any of Mr. Nixon's property, direct that the Administrator's regulations protect Mr. Nixon's opportunity to assert any right or privilege concerning the materials, provide for expedited judicial review of any such claims by Mr. Nixon, and direct that the Administrator's regulations recognize the need to give to Mr. Nixon or his heirs any materials that are not related to the Act's objectives, and (e) Mr. Nixon having previously indicated that he objected to the possible alternative of a statute providing for a civil suit for scrutiny of the materials and inquiry as to Mr. Nixon's conduct and reliability. (Burger, Ch. J., dissented from this holding.)

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — features

27. The key features of a bill of attainder are a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — burden on individual or group

28a, 28b. For purposes of the Constitution's prohibition of bills of attainder (Art I, § 9, cl 3, for Congress; Art I, § 10, cl 1, for the states), an individual or a defined group is not attainted merely because it is compelled to bear burdens which the individual or group dislikes; simple reference to the breadth of an act's focus cannot be determinative of the reach of the bill of attainder clause as a limitation upon legislative action that disadvantages a person or group.

[See annotation p 1273, infra]

Attainder and Outlawry § 1 — bill of attainder — constitutional prohibition

29. However expansive is the constitutional prohibition against bills of attainder, it does not serve as a variant of the equal protection clause, invalidating every act of Congress or the states that legislatively burdens some persons or groups but not all other plausible individuals; while the bill of attainder clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

[See annotation p 1273, infra]

Attainder and Outlawry § 4; Constitutional Law § 317 — bill of attainder — equal protection — specificity of statute

30a, 30b. Mere underinclusiveness is not fatal to the validity of a law under the equal protection clause of the Fourteenth Amendment, even if the law disadvantages an individual or identifiable members of a group; for similar reasons, the mere specificity of a law does not call into play the bill of attainder clause.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — conflict-of-interest laws

31a, 31b. Conflict-of-interests laws, which inevitably prohibit conduct on the part of designated individuals or classes of individuals, do not contravene the bill of attainder guarantee of the Constitution.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — Nixon papers statute

32. The fact that the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which requires the Administrator of General Services to take custody of former President Nixon's papers and tape recordings, and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return private papers to Mr. Nixon—refers to Mr. Nixon by name does not automatically offend the bill of attainder clause of the Constitution (Art I, § 9, cl 3).

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — punishment

33. Legislative punishment, proscribed by the bill of attainder clause of the Constitution (Art I, § 9, cl 3), is not involved merely because a federal statute imposes burdensome consequences.

[See annotation p 1273, infra]

Attainder and Outlawry §§ 1, 4 — bills of attainder — bills of pains and penalties

34. The constitutional prohibition of federal bills of attainder (Art I, § 9, cl 3) also proscribes enactments originally characterized as bills of pains and penalties—legislation inflicting punishment other than execution, including imprisonment, banishment, and the punitive confiscation of property by the sovereign; impermissible legislative punishment also includes legislation barring designated individuals or groups from participation in specified employments or vocations.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — legislative punishment

35. The functional test of the existence of legislative punishment, for purposes of the constitutional proscription of bills of attainder, involves analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — legislative punishment

36a, 36b. With regard to the constitutional proscription of bills of attainder, in determining whether punitive or nonpunitive objectives underlie a law, punishment is not restricted purely to retri-

bution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — legislative punishment

37a, 37b. With regard to the constitutional proscription of bills of attainder, one who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct.

[See annotation p 1273, infra]

Constitutional Law § 840 — due process — criminal law — evidence

38. Legislation designed to guarantee the availability of evidence for use at criminal trials is a fair exercise of Congress' responsibility to the due process of law in the fair administration of justice, and to the functioning of the adversary legal system which depends upon the availability of relevant evidence in carrying out its commitments both to fair play and to the discovery of truth within the bounds set by law.

United States § 17 — Congress' powers — monuments and historical records

39. Congress has expansive authority to act in preservation of monuments and records of historical value to the national heritage; a legislature thus acts responsibly in seeking to accomplish either of such objectives, neither of which, for purposes of the bill of attainder clause of the Constitution (Art I, § 9, cl 3), supports an implication of a legislative policy designed to inflict punishment on an individual.

Eminent Domain § 16 — extent of power — intangible and personal property

40a, 40b. The power of eminent domain is not restricted to tangible property or realty, but extends both to intangibles and to personal effects.

Attainder and Outlawry § 4 — bill of attainder — legislative punishment

41. A test of the existence of legislative punishment, for purposes of the constitutional proscription of federal bills of attainder (Art I, § 9, cl 3), is strictly a motivational one—inquiring whether the legislative record evinces a congressional intent to punish.

[See annotation p 1273, infra]

Attainder and Outlawry § 4 — bill of attainder — Congress' intent

42. Although a formal legislative announcement of moral blameworthiness or punishment is not necessary to a bill of attainder prohibited by the Constitution (Art I, § 9, cl 3), nevertheless, the absence from the legislative history of any congressional sentiments expressive of such purpose is probative of nonpunitive intentions and largely undercuts a major concern that prompted the bill of attainder prohibition—the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob.

[See annotation p 1273, infra]

United States § 21 — Nixon papers statute — use of materials

43. Under the Presidential Recordings and Materials Preservation Act (44 USCS § 2107 note)—which, in general, directs the Administrator of General Services to assume custody and control of the Presidential papers and tape recordings of former President Nixon—the Act's provision that Mr. Nixon, or any person whom he may designate in writing, shall at all times "have access to the tape records and other materials," safeguards Mr. Nixon's right to inspect, copy, and use the materials.

Courts § 95.5 — constitutionality of statute — scope of Supreme Court inquiry

44. The United States Supreme Court is not free to invalidate acts of Congress based upon inferences that the court may be asked to draw from personalized reading of the contemporary scene or recent history; in judging the constitutionality of a statute, the court may only look to its terms, to the intent expressed by members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effects.

SYLLABUS BY REPORTER OF DECISIONS

After appellant had resigned as President of the United States, he executed a depository agreement with the Administrator of General Services that provided for the storage near appellant's California home of Presidential materials (an estimated 42 million pages of documents and 880 tape recordings) accumulated during appellant's terms of office. Under this agreement, neither appellant nor the General Services Administration (GSA) could gain access to the materials without the other's consent. Appellant was not to withdraw any original writing for three years, although he could make and withdraw copies. After the initial three-year period he could withdraw any of the materials except tape recordings. With respect to the tape recordings, appellant agreed not to withdraw the originals for five years and to make reproductions only by mutual agreement. Following this five-year period the Administrator would destroy such tapes as appellant directed, and all of the tapes were to be destroyed at appellant's death or after the expiration of ten years, whichever occurred first. Shortly after the public announcement of this agreement, a bill was introduced in Congress designed to abrogate it, and about three months later this bill was enacted as the Presidential Recordings and Materials Preservation Act (Act) and was signed into law by President Ford. The Act directs the Administrator of GSA to take custody of appellant's Presidential materials and have them screened by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make the materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke." The Administrator is also directed to promulgate regulations to govern eventual public access to some of the materials. These regulations must take into account seven guidelines specified by § 104(a) of the Act, including, inter alia, the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege and the need to return to appellant or his family materials that are personal and private in nature. No such public-access regulations have yet become effective. The day after the Act was signed into law, appellant filed an action in District Court challenging the Act's constitutionality on the grounds, inter alia, that on its face it violates (1) the principle of separation of powers; (2) the Presidential privilege; (3) appellant's privacy interests; (4) his First Amendment associational rights; and (5) the Bill of Attainder Clause, and seeking declaratory and injunctive relief against enforcement of the Act. Concluding that since no public-access regulations had yet taken effect it could consider only the injury to appellant's constitutionally protected interests allegedly caused by the taking of the Presidential materials into custody and their screening by Government archivists, the District Court held that appellant's constitutional challenges were without merit and dismissed the complaint. *Held:*

1. The Act does not on its face violate the principle of separation of powers.

(a) The Act's regulation of the Executive Branch's function in the control of the disposition of Presidential materials does not in itself violate such principle, since the Executive Branch became a party to the Act's regulation when President Ford signed the Act into law and President Carter's administration, acting through the Solicitor General, urged affirmance of the District Court's judgment. Moreover, the function remains in the Executive Branch in the person of the GSA Administrator and the Government archivists, employees of that branch.

(b) The separate powers were not intended to operate with absolute independence, but in determining whether the Act violates the separation of powers principle the proper inquiry requires analysis of the extent to which the Act prevents the Executive Branch from ac-

complishing its constitutionally assigned functions, and only where the potential for disruption is present must it then be determined whether that impact is justified by an overriding need to promote objectives within Congress' constitutional authority.

(c) There is nothing in the Act rendering it unduly disruptive of the Executive Branch, since that branch remains in full control of the Presidential materials, the Act being facially designed to ensure that the materials can be released only when release is not barred by privileges inhering in that branch.

2. Neither does the Act on its face violate the Presidential privilege of confidentiality.

(a) In view of the specific directions to the GSA Administrator in § 104(a) of the Act to take into account, in determining public access to the materials, "the need to protect any party's opportunity to assert any constitutionally based right or privilege," and the need to return to appellant his purely private materials, there is no reason to believe that the restrictions on public access ultimately established by regulation will not be adequate to preserve executive confidentiality.

(b) The mere screening of the materials by Government archivists, who have previously performed the identical task for other former Presidents without any suggestion that such activity in any way interfered with executive confidentiality, will not impermissibly interfere with candid communication of views by Presidential advisors and will be no more of an intrusion into Presidential confidentiality than the in camera inspection by the District Court approved in United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090.

(c) Given the safeguards built into the Act to prevent disclosure of materials that implicate Presidential confidentiality, the requirement that appellant's personal and private materials be returned to him, and the minimal nature of the intrusion into the confidentiality of the Presidency resulting from the archivists' viewing such materials in the course of their screening process, the claims of Presidential privilege must yield to the important congressional purposes of preserving appellant's Presidential materials and maintaining access to them for lawful governmental and historical purposes.

3. The Act does not unconstitutionally invade appellant's right of privacy. While he has a legitimate expectation of privacy in his personal communications, the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, his lack of expectation of privacy in the overwhelming majority of the materials (he having conceded that he saw no more than 200,000 items), and the virtual impossibility of segregating the apparently small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the public-access regulations to be promulgated will further moot appellant's fears that his materials will be reviewed by "a host of persons," it is apparent that appellant's privacy claim has no merit.

4. The Act does not significantly interfere with or chill appellant's First Amendment associational rights. His First Amendment claim is clearly outweighed by the compelling governmental interests promoted by the Act in preserving the materials. Since archival screening is the least restrictive means of identifying the materials to be returned to appellant, the burden of that screening is the measure of the First Amendment claim, and any such burden is speculative in light of the Act's provisions protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted.

5. The Act does not violate the Bill of Attainder Clause.

(a) However expansive is the prohibition against bills of attainder, it was not

intended to serve as a variant of the Equal Protection Clause, invalidating every Act by Congress or the States that burdens some persons or groups but not all other plausible individuals. While the Bill of Attainder Clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

(b) The Act's specificity in referring to appellant by name does not automatically offend the Bill of Attainder Clause. Since at the time of the Act's passage Congress was only concerned with the preservation of appellant's materials, the papers of former Presidents already being housed in libraries, appellant constituted a legitimate class of one, and this alone can justify Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering in the Public Documents Act the further consideration of generalized standards to govern his successors.

(c) Congress, by lodging appellant's materials in the GSA's custody pending their screening by Government archivists and the promulgation of further regulations, did not "inflict punishment" within the historical meaning of bills of attainder.

(d) Evaluated in terms of Congress' asserted proper purposes of the Act to preserve the availability of judicial evidence and historically relevant materials, the Act is one of nonpunitive legislative policymaking, and there is no evidence in the legislative history or in the provisions of the Act showing a congressional intent to punish appellant.

408 F Supp 321, affirmed.

Brennan, J., delivered the opinion of the Court, in which Stewart, Marshall, and Stevens, JJ., joined; in all but Part VII of which White, J., joined; in all but Parts IV and V of which Powell, J., joined; and in Part VII of which Blackmun, J., joined. Stevens, J., filed a concurring opinion, post, p 484, 53 L Ed 2d, p 917. White, J., post, p 487, 53 L Ed 2d, p 918, Blackmun, J., post, p 491, 53 L Ed 2d, p 921, and Powell, J., post, p 492, 53 L Ed 2d, p 921, filed opinions concurring in part and concurring in the judgment. Burger, C. J., post, p 504, 53 L Ed 2d, p 929, and Rehnquist, J., filed dissenting opinions, post, p 545, 53 L Ed 2d, p 954.

APPEARANCES OF COUNSEL

Herbert J. Miller, Jr., and **Nathan Lewin** argued the cause for appellant.

Solicitor General **Wade H. McCree, Jr.,** and **Robert E. Herzstein** argued the cause for appellees.

Briefs of Counsel, p 1265, infra.

OPINION OF THE COURT

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Mr. Justice **Brennan** delivered the opinion of the Court.

Title I of Pub L 93-526, 88 Stat 1965, note following 44 USC § 2107 (1970 ed Supp V) [44 USCS § 2107], the Presidential Recordings and Materials Preservation Act (hereafter Act), directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) the separation of powers; (2) Presidential privilege doctrines; (3) appel-

lant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub L 93-526 into law. The next

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day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia, which under § 105(a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's legal or constitutional validity, or that of any regulation promulgated by the Administrator. Appellant's complaint challenged the Act's constitutionality on a number of grounds and sought declaratory and injunctive relief against its enforcement. A three-judge District Court was convened pursuant to 28 USC §§ 2282, 2284 [28 USCS §§ 2282, 2284].[1] Because regulations required by § 104 of the Act governing public access to the materials were not yet effective, the District Court held that questions going to the possibility of future public release under regulations yet to be published were not ripe for review. It found that there was "no need and no justification for this court now to reach constitutional claims directed at the regulations . . . the promulgation of [which] might eliminate, limit, or cast [the constitutional claims] in a different light." 408 F Supp 321, 336 (1976). Accordingly, the District Court limited review "to consideration of the propriety of injunctive relief against the alleged facial unconstitutionality of the statute," id., at 335, and held that the challenges to the facial constitutionality of the Act were without merit. It therefore dismissed the complaint. Id., at 374–375. We noted probable jurisdiction, 429 US 976, 50 L Ed 2d 583, 97 S Ct 483 (1976). We affirm.

I

The Background

The materials at issue consist of some 42 million pages of documents and some 880 tape recordings of conversations. Upon his resignation, appellant directed Government archivists to pack and ship the materials to him in California. This

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shipment was delayed when the Watergate Special Prosecutor advised President Ford of his continuing need for the materials. At the same time, President Ford requested that the Attorney General give his opinion respecting ownership of the materials. The Attorney General advised that the historical practice of former Presidents and the absence of any governing statute to the contrary supported ownership in the appellant, with a possible limited exception.[2] 43 Op Atty Gen No. 1 (Sept. 6, 1974), App 220–230. The Attorney General's opinion emphasized, however:

"Historically, there has been consistent acknowledgment that Pres-

1. For proceedings prior to convention of the three-judge court, see Nixon v Richey, 168 US App DC 169, 513 F2d 427 (1975), on reconsideration, 168 US App DC 172, 513 F2d 430 (1975). See also Nixon v Sampson, 389 F Supp 107 (DC 1975).

2. No opinion was given respecting ownership of certain permanent files retained by the Chief Executive Clerk of the White House from administration to administration. The Attorney General was unable definitively to determine their status on the basis of then-available information. App 228.

idential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity." Id., at 226.

On September 8, 1974, after issuance of the Attorney General's opinion, the Administrator of General Services, Arthur F. Sampson, announced that he had signed a depository agreement with appellant under the authority of 44 USC § 2107 [44 USCS § 2107]. 10 Weekly Comp of Pres Doc 1104 (1974). We shall also refer to the agreement as the Nixon-Sampson agreement. See Nixon v Sampson, 389 F Supp 107, 160–162 (DC 1975) (App A). The agreement recited that appellant retained "all legal and equitable title to the Materials, including all literary property rights," and that the materials accordingly were to be "deposited temporarily" near appellant's California home in an "existing facility belonging to the United States." Id., at 160. The agreement stated further that appellant's purpose was "to donate" the materials to the United States "with appropriate

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restrictions." Ibid. It was provided that all of the materials "shall be placed within secure storage areas to which access can be gained only by use of two keys," one in appellant's possession and the other in the possession of the Archivist of the United States or members of his staff. With exceptions not material here, appellant agreed "not to withdraw from deposit any originals of the materials" for a period of three years, but reserved the right to "make reproductions" and to authorize other persons to have access on conditions prescribed by him. After three years, appellant might exercise the "right to withdraw from deposit without formality any or all of the Materials . . . and to retain . . . [them] for any purpose . . ." determined by him. Id., at 161.

The Nixon-Sampson agreement treated the tape recordings separately. They were donated to the United States "effective September 1, 1979," and meanwhile "shall remain on deposit." It was provided however that "[s]ubsequent to September 1, 1979 the Administrator shall destroy such tapes as [Mr. Nixon] may direct" and in any event the tapes "shall be destroyed at the time of [his] death or on September 1, 1984, whichever event shall first occur." Ibid. Otherwise the tapes were not to be withdrawn, and reproductions would be made only by "mutual agreement." Id., at 162. Access until September 1, 1979, was expressly reserved to appellant, except as he might authorize access by others on terms prescribed by him.

Public announcement of the agreement was followed 10 days later, September 18, by the introduction of S 4016 by 13 Senators in the United States Senate. The bill, which became Pub L 93-526 and was designed, inter alia, to abrogate the Nixon-Sampson agreement, passed the Senate on October 4, 1974. It was awaiting action in the House of Representatives when on October 17, 1974, appellant filed suit in the District Court seeking specific enforcement of the Nixon-Sampson agreement. That action was consolidated with other suits seeking access to Presidential materials pursuant

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to the Freedom of Information Act, 5 USC § 552 (1970 ed and Supp V) [5 USCS § 552], and also seeking injunctive relief against enforcement of the agree-

ment. Nixon v Sampson, supra.[3] The House passed its version of the Senate bill on December 3, 1974. The final version of S 4016 was passed on December 9, 1974, and President Ford signed it into law on December 19.

II

The Act

Public Law 93–526 has two Titles. Title I, the challenged "Presidential Recordings and Materials Preservation Act" consists of §§ 101 through 106. Title II, the Public Documents Act, amends Chapter 33 of Title 44, United States Code, to add §§ 3315 through 3324 thereto, and establish the National Study Commission on Records and Documents of Federal Officials.

Section 101(a) of Title I directs that the Administrator of General Services, notwithstanding any other law or agreement or understanding (e.g., the Nixon-Sampson agreement), "shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

"(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

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"(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

"(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974."

Section 101(b) provides that notwithstanding any such agreement or understanding, the Administrator also "shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials [as defined by 44 USC § 2101] [44 USCS § 2101] of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974."

Section 102(a) prohibits destruction of the tapes or materials except as may be provided by law, and § 102(b) makes them available (giving priority of access to the Office of the Watergate Special Prosecutor) in response to court subpoena or other legal process, or for use in judicial proceedings. This was made subject, however, "to any rights, defenses, or privileges which the Federal Government or any person may invoke . . . ." Section 102(c) affords appellant, or any person designated by him in writing, access to the recordings and materials for any purpose

3. The Court of Appeals for the District of Columbia Circuit stayed any order effectuating the decision in Nixon v Sampson pending decision of the three-judge court whether under § 105(a) the instant case was to "have priority on the docket of [the District] court over other cases," Nixon v Richey, 168 US App DC, at 173, 177, 188–190, 513 F2d, at 431, 435, 446–448. The three-judge court was of the view that "the central purpose of Congress, in relation to all pending litigation, is to have an early and prior determination of the Act's constitutionality" and therefore did not request dissolution of the stay until entry of judgment. 408 F Supp, at 333–334, n 10.

consistent with the Act "subsequent and subject to the regulations" issued by the Administrator under § 103. See n 46, infra. Section 102(d) provides for access according to § 103 regulations by any agency or department in the Executive Branch for lawful Government use. Section 103 requires custody of the tape recordings and materials to be maintained in Washington except as may otherwise be necessary to carry out the Act, and directs that the Administrator promulgate regulations necessary to assure their protection from loss or destruction and to prevent access to them by unauthorized persons.

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Section 104, in pertinent part, directs the Administrator to promulgate regulations governing public access to the tape recordings and materials. Section 104(a) requires submission of proposed regulations to each House of Congress, the regulations to take effect under § 104(b)(1) at the end of 90 legislative days unless either the House or the Senate adopts a resolution disapproving them. The regulations must take into account seven factors specified in § 104(a), namely:

"(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

"(2) the need to make such recordings and materials available for use in judicial proceedings;

"(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;

"(4) the need to protect every individual's right to a fair and impartial trial;

"(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

"(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

"(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance."

Section 105(a) vests the District Court for the District of Columbia with exclusive jurisdiction not only to hear

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constitutional challenges to the Act, but also to hear challenges to the validity of any regulation, and to decide actions involving questions of title, ownership, custody, possession, or control of any tape or materials, or involving payment of any award of just compensation required by § 105(c) when a decision of that court holds that any individual has been deprived by the Act of private property without just compensation. Section 105(b) is a severability provision providing that any decision invalidating a provision of the Act or a regulation shall not affect the validity or enforcement of any other provision or regulation. Section 106 authorizes appropriation of such sums as may be necessary to carry out the provisions of the Title.

III

The Scope of the Inquiry

[1] The District Court correctly focused on the Act's requirement that the Administrator of General Services administer the tape recordings and materials placed in his custody only under regulations promulgated by him providing for the orderly processing of such materials for the purpose of returning to appellant such of them as are personal and private in nature, and of determining the terms and conditions upon which public access may eventually be had to those remaining in the Government's possession. The District Court also noted that in designing the regulations, the Administrator must consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained. 408 F Supp, at 334–340. This construction is plainly required by the wording of §§ 103 and 104.[4]

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Regulations implementing §§ 102 and 103, which did not require submission to Congress, and which regulate access and screening by Government archivists, have been promulgated, 41 CFR § 105-63 (1976). Public-access regulations that must be submitted to Congress under § 104(a) have not, however, become effective. The initial set proposed by the Administrator was disapproved pursuant to § 104(b)(1) by Senate Resolution. S Res 244, 94th Cong, 1st Sess (1975); 121 Cong Rec S15803–S15808 (daily ed Sept. 11, 1975). The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. S Res 428, 94th Cong, 2d Sess (1976); 122 Cong Rec S5290–S5291 (daily ed, Apr. 8, 1976). The House disapproved six provisions of a third set. HR Res 1505, 94th Cong, 2d Sess (1976). The Administrator is of the view that regulations cannot become effective except as a package and consequently is preparing a fourth set for submission to Congress. Brief for Federal Appellees 8–9, n 4.

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[2] The District Court therefore concluded that as no regulations under § 104 had yet taken effect, and as such regulations once effective were explicitly made subject to judi-

4. This interpretation has abundant support in the legislative history of the Act. Senator Javits, one of the sponsors of S 4016, stated: "[The criteria of § 104(a)] endeavor to protect due process for individuals who may be named in the papers as well as any privilege which may be involved in the papers, and of course the necessary access of the former President himself.

"In short, the argument that the bill authorizes absolute unrestricted public access does not stand up in the face of the criteria and the requirement for the regulations which we have inserted in the bill today." 120 Cong Rec 33860 (1974).

Senator Nelson, the bill's draftsman, agreed that the primary purpose to provide for the American people a historical record of the Watergate events "should not override all regard for the rights of the individual to privacy and a fair trial." Id., at 33851. Senator Ervin, also a sponsor and floor manager of the bill, stated:

"Nobody's right is affected by this bill, because it provides, as far as privacy is concerned, that the regulations of the Administrator shall take into account . . . [the] opportunity to assert any legally or constitutionally based right which would prevent or otherwise limit access to the tape recordings and other materials." Id., at 33969.

See also id., at 33960 (remarks of Sen. Ervin); id., at 37902–37903 (remarks of Rep. Brademas).

cial review under § 105, the court could consider only the injury to appellant's constitutionally protected interests allegedly worked by the taking of his Presidential materials into custody for screening by Government archivists. 408 F Supp, at 339–340. Judge McGowan, writing for the District Court, quoted the following from Watson v Buck, 313 US 387, 402, 85 L Ed 1416, 61 S Ct 962, 136 ALR 1426 (1941):

> "No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." 408 F Supp, at 336.

Only this Term we applied this principle in an analogous situation in declining to adjudicate the constitutionality of regulations of the Administrator of the Environmental Protection Agency that were in process of revision, stating: "For [the Court] to review regulations not yet promulgated, the final form of which has been only hinted at, would be wholly novel." EPA v Brown, 431 US 99, 104, 52 L Ed 2d 166, 97 S Ct 1635 (1977). See also Thorpe v Housing Authority, 393 US 268, 283–284, 21 L Ed 2d 474, 89 S Ct 518, 49 Ohio Ops 2d 374 (1969); Rosenberg v Fleuti, 374 US 449, 451, 10 L Ed 2d 1000, 83 S Ct 1804 (1963); United States v Raines, 362 US 17, 20–22, 4 L Ed 2d 524, 80 S Ct 519 (1960); Harmon v Brucker, 355

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US 579, 2 L Ed 2d 503, 78 S Ct 433 (1958). We too, therefore, limit our consideration of the merits of appellant's several constitutional claims to those addressing the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists.

The constitutional questions to be decided are, of course, of considerable importance. They touch the relationship between two of the three coordinate branches of the Federal Government, the Executive and the Legislative, and the relationship of appellant to his Government. They arise in a context unique in the history of the Presidency and present issues that this Court has had no occasion heretofore to address. Judge McGowan, speaking for the District Court, comprehensively canvassed all the claims, and in a thorough opinion, concluded that none had merit. Our independent examination of the issues brings us to the same conclusion, although our analysis differs somewhat on some questions.

IV

Claims Concerning the Autonomy of the Executive Branch

[3] The Act was the product of

joint action by the Congress and President Ford, who signed the bill into law. It is therefore urged by intervenor-appellees that, in this circumstance, the case does not truly present a controversy concerning the separation-of-powers, or a controversy concerning the Presidential privilege of confidentiality, because, it is argued, such claims may be asserted only by incumbents who are presently responsible to the American people for their action. We reject the argument that only an incumbent President may assert such claims and hold that appellant, as a former President, may also be heard to assert them. We further hold, however, that neither his separation of powers claim nor his claim of breach of constitutional privilege has merit.

Appellant argues broadly that the Act encroaches upon the

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Presidential prerogative to control internal operations of the Presidential office and therefore offends the autonomy of the Executive Branch. The argument is divided into separate but interrelated parts.

First, appellant contends that Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure. To do so, appellant contends, constitutes, without more, an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch.

Second, appellant contends, somewhat more narrowly, that by authorizing the Administrator to take custody of all Presidential materials in a "broad, undifferentiated" manner, and authorizing future publication except where a privilege is affirmatively established, the Act offends the presumptive confidentiality of Presidential communications recognized in United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974). He argues that the District Court erred in two respects in rejecting this contention. Initially, he contends that the District Court erred in distinguishing incumbent from former Presidents in evaluating appellant's claim of confidentiality. Appellant asserts that, unlike the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters, which appellant concedes may be asserted only by an incumbent President, a more generalized Presidential privilege survives the termination of the President-advisor relationship much as the attorney-client privilege survives the relationship that creates it. Appellant further argues that the District Court erred in applying a balancing test to his claim of Presidential privilege and in concluding that, notwithstanding the fact that some of the materials might legitimately be included within a claim of Presidential confidentiality, substantial public interests outweighed and justified the limited

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inroads on Presidential confidentiality necessitated by the Act's provision for Government custody and screening of the materials. Finally, appellant contends that the Act's authorization of the process of screening the materials itself violates the privilege and will chill the future exercise of constitutionally protected Executive functions, thereby impairing the ability of future Presidents to obtain the candid

advice necessary to the conduct of their constitutionally imposed duties.

A

Separation of Powers

[4] We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of the General Services Administration, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees.

Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or

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coercive influence, direct or indirect, of either of the others . . . ," Humphrey's Executor v United States, 295 US 602, 629, 79 L Ed 1611, 55 S Ct 869 (1935), and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." Id., at 630, 79 L Ed 1611, 55 S Ct 869. See also O'Donoghue v United States, 289 US 516, 77 L Ed 1356, 53 S Ct 740 (1933); Springer v Philippine Islands, 277 US 189, 201, 72 L Ed 845, 48 S Ct 480 (1928).

[5, 6] But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story[5] was expressly affirmed by this Court only three years ago in United States v Nixon, supra.

5. Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,

"did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp 325–326 (J. Cooke ed 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

"[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed 1905).

There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena duces tecum of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due

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great respect from the other branches, 418 US, at 703, 41 L Ed 2d 1039, 94 S Ct 3090, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 635, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (1952).

> "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 US, at 707, 41 L Ed 2d 1039, 94 S Ct 3090 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F Supp, at 342.[6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v Nixon, 418 US, at 711–712, 41 L Ed 2d 1039, 94 S Ct 3090. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. Ibid.

[7a] It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only "for lawful Government use, subject to the [Administrator's]

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regulations." § 102(d); 41 CFR §§ 105-63.205, 105-62.206, and 105-63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. United States v Nixon, supra. Similarly, although some of the materials may eventually be made available for public access, the Act

6. See also, e.g., 1 K. Davis, Administrative Law Treatise § 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed 1975); L. Jaffe, Judicial Control of Administrative Action 28–30 (1965); Cox, Executive Privilege, 122 U Pa L Rev 1383, 1387–1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 UCLA L Rev 92–93 (1974).

expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104(a)(5), and to return purely private materials to appellant, § 104(a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.[7] And appellant himself concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

[8a, 9a] Thus, whatever are the future possibilities for constitutional
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conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e.g., the Freedom of Information Act, 5 USC § 552 (1970 ed and Supp V) [5 USCS § 552]; the Privacy Act of 1974, 5 USC § 552(a) (1970 ed Supp V) [5 USCS § 552(a)]; the Government in the Sunshine Act, 5 USC § 552b (1976 ed) [5 USCS § 552b]; the Federal Records Act, 44 USC §§ 2101 et seq. [44 USCS §§ 2101 et seq.]; and a variety of other statutes, e.g., 13 USC §§ 8–9 [13 USCS §§ 8–9] (census data); 26 USC § 6103 [26 USCS § 6103] (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. EPA v Mink, 410 US 73, 83, 35 L Ed 2d 119, 93 S Ct 827 (1973); FAA Administrator v Robertson, 422 US 255, 45 L Ed 2d 164, 95 S Ct 2140 (1975).[8] Similar

7. **[7b]** The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by § 104(a)(5). 408 F Supp, at 340 n 23. Such notice is required by the Administrator's regulations, 41 CFR § 105-63.205 (1976), which provide: "The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access."

8. **[8b]** We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because § 105(c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in Folsom v Marsh, 9 F Cas 342, 347 (No. 4,901) (CC Mass 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the Folsom principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." Ibid. (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain "limitations directly related to the character of the documents as records of government activity." App 220–230.

[9b] On the other hand, even if legal title

congressional power

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to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See infra, at 452–454, 53 L Ed 2d 896–898.

B

Presidential Privilege

[10a, 11] Having concluded that the separation-of-powers principle is not necessarily violated by the Administrator's taking custody of and screening appellant's papers, we next consider appellant's more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny. We start with what was established in United States v Nixon, supra—that the privilege is a qualified one.[9] Appellant had argued in that case that in camera inspection by the District Court of Presidential documents and materials subpoenaed by the Special Prosecutor would itself violate the privilege without regard to whether the documents were protected from public disclosure. The Court disagreed, stating that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level

communications, without more, can sustain an absolute, unqualified Presidential privilege . . . ."[10]

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418 US, at 706, 41 L Ed 2d 1039, 94 S Ct 3090. The Court recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities,[11] but distinguished a President's "broad, undifferentiated claim of public interest in the confidentiality of such [communications]" from the more particularized and less qualified privilege relating to the need "to protect military, diplomatic, or sensitive national security secrets . . . ." Ibid. The Court held that in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effec-

rests in the Government, appellant is not thereby foreclosed from asserting under § 105(a) a claim for return of private materials retained by the Administrator in contravention of appellant's rights and privileges as specified in § 104(a)(5).

9. Like the District Court, we do not distinguish between the qualified "executive" privilege recognized in United States v Nixon and the "Presidential" privilege to which appellant refers, except to note that appellant does not argue that the privilege he claims extends beyond the privilege recognized in that case. See 408 F Supp, at 343 n 24.

10. United States v Nixon recognized that there is a legitimate governmental interest in the confidentiality of communications between high government officials, e.g., those who advise the President, and that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 US, at 705, 41 L Ed 2d 1039, 94 S Ct 3090.

11. Indeed, the opinion noted, id., at 705 n 15, 41 L Ed 2d 1039, 94 S Ct 3090, that Government confidentiality has been a concern from the time of the Constitutional Convention in 1787, the meetings of which were conducted in private, 1 M. Farrand, The Records of the Federal Convention of 1787, pp xi-xxv (1911), and the records of which were sealed for more than 30 years after the Convention. See 3 Stat 475, 15th Cong, 1st Sess, Res 8 (1818). See generally C. Warren, The Making of the Constitution 134–139 (1937).

tive functioning of the Judicial Branch. This balance was struck against the claim of privilege in that case because the Court determined that the intrusion into the confidentiality of Presidential communications resulting from in camera inspection by the District Court, "with all the protection that a district court will be obliged to provide," would be minimal and therefore that the claim was outweighed by "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch . . . ." Id., at 706–707, 41 L Ed 2d 1039, 94 S Ct 3090.

Unlike United States v Nixon, in which appellant asserted a claim of absolute Presidential privilege against inquiry by the coordinate Judicial Branch, this case initially involves appellant's assertion of a privilege against the very

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Executive Branch in whose name the privilege is invoked. The nonfederal appellees rely on this apparent anomaly to contend that only an incumbent President can assert the privilege of the Presidency. Acceptance of that proposition would, of course, end this inquiry. The contention draws on United States v Reynolds, 345 US 1, 7–8, 97 L Ed 727, 73 S Ct 528, 32 ALR2d 382 (1953), where it was said that the privilege "belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party." The District Court believed that this statement was strong support for the contention, but found resolution of the issue unnecessary. 408 F Supp, at 343–345. It sufficed, said the District Court, that the privilege, if available to a former President, was at least one that "carries much less weight than a claim asserted by the incumbent himself." Id., at 345.

It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisors. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, see United States v Nixon, 418 US, at 714, 41 L Ed 2d 1039, 94 S Ct 3090; cf. Eastland v United States Servicemen's Fund, 421 US 491, 501–503, 44 L Ed 2d 324, 95 S Ct 1813 (1975); Dombrowski v Eastland, 387 US 82, 84–85, 18 L Ed 2d 577, 87 S Ct 1425 (1967) (per curiam), a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege.

[12] Nevertheless, we think that the Solicitor General states the sounder view, and we adopt it:

> "This Court held in United States v Nixon . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he
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>
> can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The

confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure." Brief for Federal Appellees 33.

[13] At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.

[14] The appellant may legitimately assert the Presidential privilege, of course, only as to those materials whose contents fall within the scope of the privilege recognized in United States v Nixon, supra. In that case the Court held that the privilege is limited to communications "in performance of [a President's] responsibilities," 418 US, at 711, 41 L Ed 2d 1039, 94 S Ct 3090, "of his office," id., at 713, 41 L Ed 2d 1039, 94 S Ct 3090, and made "in the process of shaping policies and making decisions," id., at 708, 41 L Ed 2d 1039, 94 S Ct 3090. Of the estimated 42 million pages of documents and 880 tape recordings whose custody is at stake, the District Court concluded that the appellant's claim of Presidential privilege could apply at most to the 200,000 items with which the appellant was personally familiar.

The appellant bases his claim of Presidential privilege in this case on the assertion that the potential disclosure of

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communications given to the appellant in confidence would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking. We are called upon to adjudicate that claim, however, only with respect to the process by which the materials will be screened and catalogued by professional archivists. For any eventual public access will be governed by the guidelines of § 104, which direct the Administrator to take into account "the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege," § 104(a)(5), and the need to return purely private materials to the appellant, § 104(a)(7).

[15] In view of these specific directions, there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and

eventual disclosure.[12] The
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screening processes for sorting materials for lodgment in these libraries also involved comprehensive review by archivists, often involving materials upon which access restrictions ultimately have been imposed. 408 F Supp, at 347. The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

[10b, 16a] We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisors.[13] We agree with the District Court that, thus framed, the question is readily resolved. The screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns. These very personnel have performed the identical task in each of the Presidential
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libraries without any suggestion that such activity has in any way interfered with executive confidentiality. Indeed, in light of this consistent historical practice, past and present executive officials must be well aware of the possibility that, at some time in the future, their communications may be reviewed on a confidential basis by professional archivists. Appellant has suggested no reason why review under the instant Act, rather than the Presidential Libraries Act, is significantly more likely to impair confidentiality, nor has he called into question the District Court's finding that the archivists' "record for discretion in handling confidential material is unblemished." 408 F Supp, at 347.

12. The District Court found that in the Hoover Library there are no restrictions on Presidential papers, although some restrictions exist with respect to personal and private material, and in the Roosevelt Library, less than 0.5% of the materials is restricted. There is no evidence in the record as to the percentage of materials currently under restriction in the Truman or Eisenhower Libraries, but in the Kennedy Library, 85% of the material has been processed, and of the processed materials, only 0.6% is under donor (as distinguished from security-related) restriction. In the Johnson Library, review of nonclassified material is virtually complete, and more than 99% of all nonsecurity classified materials is unrestricted. In each of the Presidential libraries, provision has been made for the removal of the restrictions with the passage of time. 408 F Supp, at 346 n 31.

13. Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process served upon the Administrator. As we have noted, see n 7, supra, the appellant is to be advised prior to any access to the materials, and he is thereafter free to review the specific materials at issue, see § 102(c); 41 CFR § 105-63.301 (1976), in order to determine whether to assert any rights, privileges, or defenses. Section 102(b) expressly conditions ultimate access by way of lawful process upon the right of appellant to invoke any rights, defenses, or privileges.

[16b] Second, § 102(d) of the Act states: "Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials . . . for lawful Government use . . . ." The District Court eschewed a broad reading of that section as permitting wholesale access by any executive official for any conceivable executive purpose. Instead, it construed § 102(d) in light of Congress' presumed intent that the Act operate within constitutional bounds—an intent manifested throughout the statute, see 408 F Supp, at 337 n 15. The District Court thus interpreted § 102(d), and in particular the phrase "lawful use," as requiring that once appellant is notified of requested access by an executive official, see n 7, supra, he be allowed to assert any constitutional right or privilege that in his view would bar access. See 408 F Supp, at 338 n 18. We agree with that interpretation.

[17] Moreover, adequate justifications are shown for this limited intrusion into executive confidentiality comparable to those held to justify the in camera inspection of the District Court sustained in United States v Nixon, supra. Congress' purposes in enacting the Act are exhaustively treated in the opinion of the District Court. The legislative history of the Act clearly reveals that, among other purposes, Congress acted to establish regular procedures to deal with the perceived need to preserve the materials for legitimate historical and governmental purposes.[14] An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.[15] Nor should the American people's ability to reconstruct

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and come to terms with their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present.[16] Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.

Other substantial public interests that led Congress to seek to preserve appellant's materials were the desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation. Thus by preserving these materials, the Act may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power, see, e.g., Eastland v United States Servicemen's Fund, 421 US 491, 44 L Ed 2d 324, 95 S Ct 1813 (1975). And, of course, the Congress repeatedly referred to the importance of the materials to the Judiciary in the event that they shed light upon issues in civil or criminal litigation, a social

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interest that can-

14. From its exhaustive survey of the legislative history, the District Court concluded that the public interests served by the Act could be merged under "the rubric of preservation of an accurate and complete historical record." Id., at 348–349.

15. S Rep No. 93-1181, pp 3–5 (1974); HR Rep No. 93-1507, p 3 (1974); 120 Cong Rec 3794 (remarks of Rep. Abzug). See also § 102(d) of the Act.

Presidents in the past have had to apply to the Presidential libraries of their predecessors for permission to examine records of past governmental actions relating to current governmental problems. See 408 F Supp, at 351–352. Although it appears that most such requests have been granted, Congress could legitimately conclude that the situation was unstable and ripe for change. It is clear from the face of the Act that making the materials available for the ongoing conduct of Presidential policy was at least one of the objectives of the Act. See § 102(d).

16. S Rep No. 93-1181, pp 1, 3 (1974); HR Rep No. 93-1507, pp 2–3, 8 (1974); Hearing on GSA Regulations Implementing Presidential Recordings and Materials Preservation Act before the Senate Committee on Government Operations, 94th Cong, 1st Sess, p 256 (1975); 120 Cong Rec 31549–31550 (1974) (remarks of Sen. Nelson); id., at 33850–33851; id., at 33863 (remarks of Sen. Ervin); id., at 33874–33875(remarks of Sen. Huddleston); id., at 33875–33876 (remarks of Sen. Ribicoff); id., at 33876 (remarks of Sen. Muskie); id., at 33964–33965 (remarks of Sen. Nelson); id., at 37900–37901 (remarks of Rep. Brademas). See also §§ 101(b)(1), 104(a)(7) of the Act.

not be doubted. See United States v Nixon, supra.[17]

In light of these objectives, the scheme adopted by Congress for preservation of the appellant's Presidential materials cannot be said to be overbroad. It is true that among the voluminous materials to be screened by archivists are some materials that bear no relationship to any of these objectives (and whose prompt return to appellant is therefore mandated by § 104(a)(7)). But these materials are commingled with other materials whose preservation the Act requires, for the appellant, like his predecessors, made no systematic attempt to segregate official, personal, and private materials. 408 F Supp, at 355. Even individual documents and tapes often intermingle communications relating to governmental duties, and of great interest to historians or future policymakers, with private and confidential communications. Ibid.

Thus, as in the Presidential libraries, the intermingled state of the materials requires the comprehensive review and classification contemplated by the Act if Congress' important objectives are to be furthered. In the course of that process, the archivists will be required to view the small fraction of the materials that implicate Presidential confidentiality, as well as personal and private materials to be returned to appellant. But given the safeguards built into the Act to prevent disclosure of such materials and the minimal nature of the intrusion into the confidentiality of the Presidency, we believe that the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes.

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[10c, 18] In short, we conclude that the screening process contemplated by the Act will not constitute a more severe intrusion into Presidential confidentiality than the in camera inspection by the District Court approved in United States v Nixon, 418 US, at 706, 41 L Ed 2d 1039, 94 S Ct 3090. We must, of course presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act. Thus, there is no basis for appellant's claim that the Act "reverses" the presumption in favor of confidentiality of Presidential papers recognized in United State v Nixon. Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions on their face are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless

17. As to these several objectives of the legislature, see S Rep No. 93-1181, pp 1, 3–4, 6 (1974); HR Rep No. 93-1507, pp 2–3, 8 (1974); 120 Cong Rec 31549–31550 (1974) (remarks of Sen. Nelson); id., at S 33849–33851; id., at 37900–37901 (remarks of Rep. Brademas); id., at 37905 (remarks of Rep. McKinney). See also §§ 12(b), 104(a) of the Act.

prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act on its face does not violate the Presidential privilege.

V

Privacy

[19a] Appellant concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight. See, e.g., New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964). He argues, however, that he was not thereby stripped of all legal protection for his privacy, and contends that the Act violates fundamental rights of expression and privacy guaranteed to him by the First, Fourth, and Fifth Amendments.[18]

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The District Court treated appellant's argument as addressed only to the process by which the screening of the materials will be performed. "Since any claim by [appellant] that his privacy will be invaded by public access to private materials must be considered premature when it must actually be directed to the regulations once they become effective, we need not consider how the materials will be treated after they are reviewed." 408 F Supp, at 358. Although denominating the privacy claim "[t]he most troublesome challenge that plaintiff raises . . . ," id., at 357, the District Court concluded that the claim was without merit. The court reasoned that the proportion of the 42 million pages of documents and 880 tape recordings implicating appellant's privacy interests was quite small since the great bulk of the materials related to appellant's conduct of his duties as President, and were therefore materials to which great public interest attached. The touchstone of the legality of the archival processing, in the District Court's view, was its reasonableness. Balancing the public interest in preserving the materials touching appellant's performance of his official duties against the invasion of appellant's privacy that archival screening necessarily entails, the District Court concluded that the Act was not unreasonable and hence not facially unconstitutional:

> "Here, we have a processing scheme without which national interests of overriding importance cannot be served . . . ." Id., at 364.

Thus, the Act "is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives. The processing contemplated by the Act—at least as narrowed by carefully tailored regulations—represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding

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importance." Id., at 367. We agree with

18. Insofar as appellant argues a privacy claim based upon the First Amendment, see Part VI, infra. In joining this part of the opinion, Mr. Justice Stewart adheres to his views on privacy as expressed in his concurring opinion in Whalen v Roe, 429 US 589, 607, 51 L Ed 2d 64, 97 S Ct 869 (1977).

the District Court that the Act does not unconstitutionally invade appellant's right of privacy.

[20a, 21, 22a] One element of privacy has been characterized as "the individual interest in avoiding disclosure of personal matters . . . ." Whalen v Roe, 429 US 589, 599, 51 L Ed 2d 64, 97 S Ct 869 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. 408 F Supp, at 360.[19] We may assume with the District

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Court, for the purposes of this case, that this pattern of de facto Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials. Katz v United States, 389 US 347, 351–353, 19 L Ed 2d 576, 88 S Ct 507 (1967).[20] This expectation is independent of the question of ownership of the materials, an issue we do not reach. See n 8, supra. But the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening. Camara v Municipal Court, 387 US 523, 534–539, 18 L Ed 2d 930, 87 S Ct 1727 (1967); Terry v Ohio, 392 US 1, 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968).[21] Under

19. The District Court, 408 F Supp, at 360 n 54, surveyed evidence in the record respecting depository restrictions for all Presidents since President Hoover. It is unclear whether President Hoover actually excluded any of his personal and private materials from the scope of his gift, although his offer to deposit materials in a Presidential library reserved the right to do so. President Franklin D. Roosevelt also indicated his intention to select certain materials from his papers to be retained by his family. Because of his death, this function was performed by designated individuals and by his secretary. Again the record is unclear as to how many materials were removed. A number of personal documents deemed to be personal family correspondence were turned over to the Roosevelt family library in 1948, later returned to the official library in 1954–1955, and have been on loan to the family since then. It is unclear to what extent these materials were reviewed by the library personnel.

President Truman withheld from deposit the personal file maintained in the White House by his personal secretary. This file was deposited with the library upon his death in 1974, although the terms of his will excluded a small number of items determined by the executors of his will to pertain to personal or business affairs of the Truman family. President Eisenhower's offer to deposit his Presidential materials excluded materials determined by him or his representative to be personal or private. President Kennedy's materials deposited with GSA did not include certain materials relating to his private affairs, and some recordings of meetings involving President Kennedy, although physically stored in the Kennedy Library, have not yet been turned over to the library or reviewed by Government archivists. President Johnson's offer to deposit materials excluded items which he determined to be of special or private interest pertaining to personal or family affairs.

20. [20b] Even if prior Presidents had declined to assert their privacy interests in such materials, their failure to do so would not necessarily bind appellant, for privacy interests are not solely dependent for their constitutional protection upon established practice of governmental toleration.

21. [22b] We agree with the District Court that the Fourth Amendment's warrant requirement is not involved. 408 F Supp, at 361–362.

this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of Whalen v Roe, supra. Emphasizing the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system, Whalen rejected a constitutional objection to New York's program on privacy grounds. Not only does the Act challenged here mandate regulations similarly aimed at preventing undue dissemination of private materials but, unlike Whalen, the Government will not even retain long-term control over

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such private information; rather, purely private papers and recordings will be returned to appellant under § 104(a)(7) of the Act.

[23] The overwhelming bulk of the 42 million pages of documents and the 880 tape recordings pertain, not to appellant's private communications, but to the official conduct of his Presidency. Most of the 42 million pages were prepared and seen by others and were widely circulated within the Government. Appellant concedes that he saw no more than 200,000 items, and we do not understand him to suggest that his privacy claim extends to items he never saw. See United States v Miller, 425 US 435, 48 L Ed 2d 71, 96 S Ct 1619 (1976). Further, it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency. And, of course, appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public. United States v Dionisio, 410 US 1, 14, 35 L Ed 2d 67, 93 S Ct 764 (1973); Katz v United States, supra, at 351, 19 L Ed 2d 576, 88 S Ct 507. Therefore, appellant's privacy claim embracing, for example, "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files," 408 F Supp, at 359, relates only to a very small fraction of the massive volume of official materials with which they are presently commingled.[22]

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The fact that appellant may assert his privacy claim as to only a small fraction of the materials of his Presidency is plainly relevant in judging the reasonableness of the screening process contemplated by the Act, but this of course does not, without more, require rejection of his privacy argument. Id., at 359. Although the Act requires that the regulations promulgated by the Administrator under § 104(a) take into account appellant's legally and constitutionally based rights and privileges, presum-

22. Some materials are still in appellant's possession, as the Administrator has not yet attempted to act on his authority under § 101(b)(1) to take custody of them. See Brief for Federal Appellees 4 n 1. Moreover, the Solicitor General conceded at oral argument that there are certain purely private materials which "should be returned to [appellant] once . . . identified." Tr of Oral Arg 58–59. The District Court enjoined the Government from "processing, disclosing, inspecting, transferring, or otherwise disposing of any materials . . . which might fall within the coverage of . . . the Act. . . ." 408 F Supp, at 375. As the District Court's stay is no longer in effect, the Government should now promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him.

ably including his privacy rights, § 104(a)(5), and also take into account the need to return to appellant his private materials, § 104(a)(7),[23] the identity and separation of these purely private matters can be achieved, as all parties concede, only by screening all of the materials.

Appellant contends that the Act therefore is tantamount to a general warrant authorizing search and seizure of all of his Presidential "papers and effects." Such "blanket authority," appellant contends, is precisely the kind of abuse that the Fourth Amendment was intended to prevent, for " 'the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists [in] rummaging about among his effects to secure evidence against him.' " Brief for Appellant 148, quoting United States v Poller, 43 F2d 911, 914 (CA2 1930). Thus, his brief continues, id., at 150–151:

". . . [Appellant's] most private thoughts and communications, both written and spoken, will be exposed to and reviewed by a host of persons whom he does not know and

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did not select, and in whom he has no reason to place his confidence. This group will decide what is personal, to be returned to [him], and what is historical, to be opened for public review."[24]

Appellant principally relies on Stanford v Texas, 379 US 476, 13 L Ed 2d 431, 85 S Ct 506 (1965), but that reliance is misplaced. Stanford invalidated a search aimed at obtaining evidence that an individual had violated a "sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years." Id., at 477, 13 L Ed 2d 431, 85 S Ct 506. The search warrant authorized a search of his private home for books, records, and other materials concerning illegal Communist activities. After spending more than four hours in Stanford's house, police officers seized half of his books which included works by Sartre, Marx, Pope John XXIII, Mr. Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents including a marriage certificate, insurance policies, household

23. The Solicitor General implied at oral argument that the requirement of the guidelines directing the Administrator to consider the need to return to appellant "for his sole custody and use . . . materials which are not [Watergate related] . . . and are not otherwise of general historical significance," § 104(a)(7), is further qualified by the requirement under §§ 102(b) and 104(a)(5), that the regulations promulgated by the Administrator take into account the need to protect appellant's rights, defenses, or privileges. Tr of Oral Arg 37–38.

24. Appellant argues that screening under the Act contrasts with the screening procedures followed by earlier Presidents who, "in donating materials to Presidential libraries, have been able . . . to participate in the selection of persons who would review the materials for classification purposes." Brief for Appellant 151 n 68. We are unable to say that the record substantiates this assertion. The record is most complete with respect to President Johnson, who appears to have recommended the individual who was later selected as Director of the Johnson Library, but seems not to have played any role in the selection of the archivists actually performing the day-to-day processing. 408 F Supp, at 365 n 60. Moreover, we agree with the District Court that it is difficult to see how professional archivists performing a screening task under proper standards would be meaningfully affected in the performance of their duties by loyalty to individuals or institutions. Ibid.

bills and receipts, and personal correspondence. Id., at 479–480, 13 L Ed 2d 431, 85 S Ct 506. Stanford held this to be an unconstitutional general search.

The District Court concluded that the Act's provisions for

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custody and screening could not be analogized to a general search and that Stanford, therefore, did not require the Act's invalidation. 408 F Supp, at 366–367, n 63. We agree. Only a few documents among the vast quantity of materials seized in Stanford were even remotely related to any legitimate Government interest. This case presents precisely the opposite situation: the vast proportion of appellant's Presidential materials are official documents or records in which appellant concedes the public has a recognized interest. Moreover, the Act provides procedures and orders the promulgation of regulations expressly for the purpose of minimizing the intrusion into appellant's private and personal materials. Finally, the search in Stanford was an intrusion into an individual's home to search and seize personal papers in furtherance of a criminal investigation and designed for exposure in a criminal trial. In contrast, any intrusion by archivists into appellant's private papers and effects is undertaken with the sole purpose of separating private materials to be returned to appellant from nonprivate materials to be retained and preserved by the Government as a record of appellant's Presidency.

Moreover, the screening will be undertaken by Government archivists with, as the District Court noted, "an unblemished record for discretion," 408 F Supp, at 365. That review can hardly differ materially from that contemplated by appellant's intention to establish a Presidential library, for Presidents who have established such libraries have found that screening by professional archivists was essential. Although the District Court recognized that this contemplation of archival review would not defeat appellant's expectation of privacy, the court held that it does indicate that "in the special situation of documents accumulated by a President during his tenure and reviewed by professional government personnel, pursuant to a process employed by past Presidents, any intrusion into privacy interests is less substantial than it might appear at first." Ibid. (citation omitted).

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The District Court analogized the screening process contemplated by the Act to electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC §§ 2510 et seq. [18 USCS §§ 2510 et seq.] (1970). 408 F Supp, at 363. We think the analogy is apt. There are obvious similarities between the two procedures. Both involve the problem of separating intermingled communications, (1) some of which are expected to be related to legitimate Government objectives, (2) some of which are not, and (3) for which there is no means to segregate the one from the other except by reviewing them all. Thus the screening process under the Act, like electronic surveillance, requires some intrusion into private communications unconnected with any legitimate governmental objectives. Yet this fact has not been thought to render surveillance under the Omnibus Act unconstitutional. Cf., e.g., United States v Donovan, 429 US

413, 50 L Ed 2d 652, 97 S Ct 658 (1977); Berger v New York, 388 US 41, 18 L Ed 2d 1040, 87 S Ct 1873 (1967). See also 408 F Supp, at 363–364.

[22c] Appellant argues that this analogy is inappropriate because the electronic surveillance procedure was carefully designed to meet the constitutional requirements enumerated in Berger v New York, supra, including (1) prior judicial authorization, (2) specification of particular offenses said to justify the intrusion, (3) specification "with particularity" of the conversations sought to be seized, (4) minimization of the duration of the wiretap, (5) termination once the conversation sought is seized, and (6) a showing of exigent circumstances justifying use of the wiretap procedure. Brief for Appellant 157. Although the parallel is far from perfect, we agree with the District Court that many considerations supporting the constitutionality of the Omnibus Act also argue for the constitutionality of this Act's materials screening process. For example, the Omnibus Act permits electronic surveillance only to investigate designated crimes that are serious in nature, 18 USC § 2516 [18 USCS § 2516], and only when normal investigative techniques have failed or are likely to do so, § 2518(3)(c). Similarly,

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the archival review procedure involved here is designed to serve important national interests asserted by Congress, and the unavailability of less restrictive means necessarily follows from the commingling of the documents.[25] Similarly, just as the Omnibus Act expressly requires that interception of nonrelevant communications be minimized, § 2518(5), the Act's screening process is designed to minimize any privacy intrusions, a goal that is further reinforced by regulations which must take those interests into account.[26] The fact that apparently only a minute portion of the materials implicates appellant's privacy interests[27] also negates any conclusion

25. Appellant argues that, unlike electronic surveillance, where success depends upon the subject's ignorance of its existence, appellant could have been allowed to separate his personal from official materials. But Congress enacted the Act in part to displace the Nixon-Sampson agreement that expressly provided for automatic destruction of the tape recordings in the event of appellant's death and that allowed appellant complete discretion in the destruction of materials after the initial three-year storage period.

Moreover, appellant's view of what constitutes official as distinguished from personal and private materials might differ from the view of Congress, the Executive Branch, or a reviewing court. Not only may the use of disinterested archivists lead to application of uniform standards in separating private from nonprivate communications, but the Act provides for judicial review of their determinations. This would not be the case as to appellant's determinations.

26. [22d] The District Court found, 408 F Supp, at 364 n 58, and we agree, that it is irrelevant that Title III, unlike this Act, requires adherence to a detailed warrant requirement, 18 USC § 2518 [18 USCS § 2518]. That requirement is inapplicable to this Act, since we deal not with standards governing a generalized right to search by law enforcement officials or other Government personnel, but with a particularized legislative judgment, supplemented by judicial review, similar to condemnation under the power of eminent domain, that certain materials are of value to the public.

27. The fact that the overwhelming majority of the materials is relevant to Congress' lawful objectives is in contrast to the experience under the Omnibus Crime Control Act. A recent report on surveillance conducted under the Omnibus Act indicates that for the calendar year 1976 more than one-half of all wire intercepts authorized by judicial order yielded only nonincriminating communications. Administrative Office of the U.S. Courts, Report on Applications for Orders Authorizing or Approving the Interception of

that

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the screening process is an unreasonable solution to the problem of separating commingled communications.

[19b] In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see § 104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons,"[28] Brief for Appellant 150, we are compelled to agree with the District Court that appellant's privacy claim is without merit.

VI

First Amendment

[24] During his Presidency appellant served also as head of his national political party and spent a substantial portion of

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his working time on partisan political matters. Records arising from his political activities, like his private and personal records, are not segregated from the great mass of materials. He argues that the Act's archival screening process therefore necessarily entails invasion of his constitutionally protected rights of associational privacy and political speech. As summarized by the District Court: "It is alleged that the Act invades the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by [appellant]—especially those critical of themselves—will refuse to associate with him. The Act is furthermore said to chill [his] expression because he will be 'saddled' with prior positions communicated in private, leaving him unable to take inconsistent positions in the future." 408 F Supp, at 367–368.

The District Court, viewing these arguments as in essence a claim that disclosure of the materials violated appellant's associational privacy, and therefore as not significantly different in structure from appellant's privacy claim, again treated the arguments as limited to the con-

Wire or Oral Communications, Jan. 1, 1976 to Dec. 31, 1976, p XII (Table 4).

28. Throughout this litigation appellant has claimed that his privacy will necessarily be unconstitutionally invaded because the screening requires a staff of "over one hundred archivists, accompanied by lawyers, technicians and secretaries [who] will have a right to review word-by-word five and one-half years of a man's life . . . ." Tr of Oral Arg 16. The size of the staff is, of course, necessarily a function of the enormous quantity of materials involved. But clearly not all engaged in the screening will examine each document. The Administrator initially proposed that only one archivist examine most documents. See 408 F Supp, at 365 n 59.

stitutionality of the Act's screening process. Id., at 368. As was true with respect to the more general privacy challenge, only a fraction of the materials can be said to raise a First Amendment claim. Nevertheless, the District Court acknowledged that appellant would "appear . . . to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening took place." Ibid. The District Court concluded, however, that there was no reason to believe that the mandated regulations when promulgated would not adequately protect against public access to materials implicating appellant's privacy in political association, and that "any burden arising solely from review by professional and discreet archivists is not significant." The court therefore held that the Act does not significantly

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interfere with or chill appellant's First Amendment rights. Id., at 369. We agree with the District Court's conclusion.

[25] It is, of course, true that involvement in partisan politics is closely protected by the First Amendment, Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976), and that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id., at 64, 46 L Ed 2d 659, 96 S Ct 612. But a compelling public need that cannot be met in a less restrictive way will override those interests, Kusper v Pontikes, 414 US 51, 58–59, 38 L Ed 2d 260, 94 S Ct 303 (1973); United States v O'Brien, 391 US 367, 376–377, 20 L Ed 2d 672, 88 S Ct 1673 (1968); Shelton v Tucker, 364 US 479, 488, 5 L Ed 2d 231, 81 S Ct 247 (1960), "particularly when the 'free functioning of our national institutions' is involved." Buckley v Valeo, supra, at 66, 46 L Ed 2d 659, 96 S Ct 612. Since no less restrictive way than archival screening has been suggested as a means for identification of materials to be returned to appellant, the burden of that screening is presently the measure of his First Amendment claim. Id., at 84, 46 L Ed 2d 659, 96 S Ct 612. The extent of any such burden, however, is speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted. §§ 104(a)(5), 104 (a)(7), 105(a).[29] As the District Court concluded, the First Amendment

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claim is clearly outweighed by the important governmental interests promoted by the Act.

For the same reasons, we find no merit in appellant's argument that the Act's scheme for custody and

29. Appellant argues that Shuttlesworth v Birmingham, 394 US 147, 150–151, 22 L Ed 2d 162, 89 S Ct 935 (1969); Cox v Louisiana, 379 US 536, 13 L Ed 2d 471, 85 S Ct 453 (1965); Staub v Baxley, 355 US 313, 319–321, 2 L Ed 2d 302, 78 S Ct 277 (1958); Thomas v Collins, 323 US 516, 538–541, 89 L Ed 430, 65 S Ct 315 (1945); and Lovell v Griffin, 303 US 444, 452–453, 82 L Ed 949, 58 S Ct 666 (1938), support his contention that "[a] statute which vests such broad authority [with respect to First Amendment rights] is unconstitutional on its face, and the party subjected to it may treat it as a nullity *even if its actual implementation would not harm him.*" Brief for Appellant 169. The argument is without merit. Those cases involved regulations that permitted public officials in their arbitrary discretion to impose prior restraints on expressional or associational activities. In contrast, the Act is concerned only with materials that record past activities and with a screening process guided by longstanding archival screening standards.

archival screening of the materials "necessarily inhibits [the] freedom of political activity [of future Presidents] and thereby reduces the 'quantity and diversity' of the political speech and association that the Nation will be receiving from its leaders." Brief for Appellant 168. It is significant, moreover, that this concern has not deterred President Ford from signing the Act into law, or President Carter from urging this Court's affirmance of the judgment of the District Court.

VII

Bill of Attainder Clause

A

[26a, 27] Finally, we address appellant's argument that the Act constitutes a bill of attainder proscribed by Art I, § 9, of the Constitution.[30] His argument is that Congress acted on the premise that he had engaged in "'misconduct,'" was an "'unreliable custodian'" of his own documents, and generally was deserving of a *"legislative judgment* of blameworthiness," Brief for Appellant 132–133. Thus, he argues, the Act is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. See United States v Brown, 381

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US 437, 445, 447, 14 L Ed 2d 484, 85 S Ct 1707 (1965); United States v Lovett, 328 US 303, 315–316, 90 L Ed 1252, 66 S Ct 1073 (1946); Ex parte Garland, 4 Wall 333, 377, 18 L Ed 366 (1867); Cummings v Missouri, 4 Wall 277, 323, 18 L Ed 356 (1867).

Appellant's argument relies almost entirely upon United States v Brown, supra, the Court's most recent decision addressing the scope of the Bill of Attainder Clause. It is instructive, therefore, to sketch the broad outline of that case. Brown invalidated § 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 504 [29 USCS § 504], that made it a crime for a Communist Party member to serve as an officer of a labor union. After detailing the infamous history of bills of attainder, the Court found that the Bill of Attainder Clause was an important ingredient of the doctrine of "separation of powers," one of the organizing principles of our system of government. 381 US, at 442–443, 14 L Ed 2d 484, 85 S Ct 1707. Just as Art III confines the Judiciary to the task of adjudicating concrete "cases or controversies," so too the Bill of Attainder Clause was found to "reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." 381 US, at 445, 14 L Ed 2d 484, 85 S Ct 1707. Brown thus held that § 504 worked a bill of attainder by focusing upon easily identifiable members of a class—members of the Communist Party—and imposing on them the sanction of mandatory for-

30. Article I, § 9, applicable to Congress, provides that "[n]o Bill of Attainder or ex post facto Law shall be passed," and Art I, § 10, applicable to the States, provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law . . . ." The linking of bills of attainder and ex post facto laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment. See Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, pp 92–93 (1956).

feiture of a job or office, long deemed to be punishment within the contemplation of the Bill of Attainder Clause. See, e.g., United States v Lovett, supra, at 316, 90 L Ed 1252, 66 S Ct 1073; Cummings v Missouri, supra, at 320, 18 L Ed 356.

Brown, Lovett, and earlier cases unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder. But appellant's proposed reading is far broader still. In essence, he argues that Brown establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class

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that is not defined at a proper level of generality. The Act in question therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.

[28a, 29, 30a, 31a] Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality.[31] Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. United States v Lovett, supra, at 324, 90 L Ed 1252, 66 S Ct 1073 (Frankfurter, J., concurring).[32]

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However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine,[33]

31. **[28b]** In this case, for example, appellant faults the Act for taking custody of his papers but not those of other Presidents. Brief for Appellant 130. But even a congressional definition of the class consisting of all Presidents would have been vulnerable to the claim of being overly specific, since the definition might more generally include all members of the Executive Branch, or all members of the Government, or all in possession of Presidential papers, or all in possession of Government papers. This does not dispose of appellant's contention that the Act focuses upon him with the requisite degree of specificity for a bill of attainder, see infra, at 471–472, 53 L Ed 2d 909, but it demonstrates that simple reference to the breadth of the Act's focus cannot be determinative of the reach of the Bill of Attainder Clause as a limitation upon legislative action that disadvantages a person or group. See, e. g., United States v Brown, 381 US 437, 474–475, 14 L Ed 2d 484, 85 S Ct 1707 (1965) (White, J., dissenting); n 34, infra.

32. "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

33. **[30b]** We observe that appellant originally argued that "for similar reasons" the Act violates both the Bill of Attainder Clause and equal protection of the laws. Jurisdictional Statement 27–28. He has since abandoned reliance upon the equal protection argument, apparently recognizing that mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment, New Orleans v Dukes, 427 US 297, 49 L Ed 2d 511, 96 S Ct 2513 (1976); Katzenbach v Morgan, 384 US 641, 657, 16 L Ed 2d 828, 86 S Ct 1717 (1966), even if the law disadvantages an individual or identifiable members of a group, see, e. g., Williamson v Lee Optical Co. 348 US 483, 99 L Ed 563, 75 S Ct 461 (1955) (opticians);

invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.[34] In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," United States v Brown, 381 US, at 443, 14 L Ed 2d 484, 85 S Ct 1707, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

[32] Thus, in the present case, the Act's specificity—the fact that

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it refers to appellant by name—does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, Congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of certain of the materials. Indeed, as the federal appellees argue, "appellant's depository agreement . . . created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die." Brief for Federals Appellees 41. In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors.

[33] Moreover, even if the specificity element were deemed to be satisfied here, the Bill of Attainder Clause would not automatically be implicated. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must in-

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Daniel v Family Ins. Co. 336 US 220, 93 L Ed 632, 69 S Ct 550, 10 ALR2d 945 (1949) (insurance agents). "For similar reasons" the mere specificity of a law does not call into play the Bill of Attainder Clause. Cf. Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, 54 Calif L Rev 212, 234–236 (1966); but see Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale LJ 330 (1962).

34. **[31b]** Brown recognized this by making clear that conflict-of-interest laws, which inevitably prohibit conduct on the part of designated individuals or classes of individuals, do not contravene the bill of attainder guarantee. Brown specifically noted the validity of § 32 of the Banking Act of 1933, 12 USC § 78 [12 USCS § 78], which disqualified identifiable members of a group—officers and employees of underwriting organizations—from serving as officers of Federal Reserve banks, 381 US, at 453, 14 L Ed 2d 484, 85 S Ct 1707. Other valid federal conflict-of-interest statutes which also single out identifiable members of groups to bear burdens or disqualifications are collected, id., at 467–468, n 2, 14 L Ed 2d 484, 85 S Ct 1707 (White, J., dissenting). See also Regional Rail Reorganization Act Cases, 419 US 102, 42 L Ed 2d 320, 95 S Ct 335 (1974) (upholding transfer of rail properties of eight railroad companies to Government-organized corporation).

quiring further whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of further regulations, "inflict[ed] punishment" within the constitutional

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proscription against bills of attainder. United States v Lovett, 328 US, at 315, 90 L Ed 1252, 66 S Ct 1073 see also United States v Brown, supra, at 456–460, 14 L Ed 2d 484, 85 S Ct 1707; Cummings v Missouri, 4 Wall, at 320, 18 L Ed 356.

B

1

[34] The infamous history of bills of attainder is a useful starting point in the inquiry whether the Act fairly can be characterized as a form of punishment leveled against appellant. For the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art I, § 9. A statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect.

In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death.[35] Article I, § 9, however, also

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proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution. United States v Lovett, supra, at 323–324, 90 L Ed 1252, 66 S Ct 1073 (Frankfurter, J., concurring); Cummings v Missouri, supra, at 323, 18 L Ed 356; Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p 97 (1956). Generally addressed to persons considered disloyal to the Crown or State, "pains and penalties" historically consisted of a wide array of punishments: commonly included were imprisonment,[36] banishment,[37] and the punitive confiscation

35. See, for example, the 1685 attainder of James, Duke of Monmouth, for High Treason: "WHEREAS James duke of Monmouth has in an hostile manner invaded this kingdom, and is now in open rebellion, levying war against the king, contrary to the duty of his allegiance; Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this parliament assembled, and by the authority of the same, That the said James duke of Monmouth stand and be convicted and attainted of high treason, and that he suffer pains of death, and incur all forfeitures as a traitor convicted and attainted of high treason." 1 Jac 2, c 2 (1685) (emphasis omitted).

The attainder of death was usually accompanied by a forfeiture of the condemned person's property to the King and the corruption of his blood, whereby his heirs were denied the right to inherit his estate. Blackstone traced the practice of *"corruption of blood"* to the Norman conquest. He considered the practice an "oppressive mark of feudal tenure" and hoped that it "may in process of time be abolished by act of parliament." 4 W. Blackstone Commentaries* 388. The Framers of the United States Constitution responded to this recommendation. Art III, § 3.

36. See, e. g., 10 & 11 Will 3, c 13 (1701): "An Act for continuing the Imprisonment of *Counter* and others, for the late horrid conspiracy to assassinate the person of his sacred Majesty."

37. See, e. g., Cooper v Telfair, 4 Dall 14, 1 L Ed 721 (1800) (" 'all and every the persons, named and included in the said act [declaring persons guilty of treason] are banished from the said state [Georgia]' "); 2 R. Wooddeson, A Systematical View of the Laws of England 638–639 (1792) (banishment of Lord Clarendon and the Bishop Atterbury). See Kennedy v Mendoza-Martinez, 372 US 144, 168, n 23, 9 L Ed 2d 644, 83 S Ct 554 (1963).

of property by the sovereign.[38] Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal. See, e. g., Cummings v Missouri, supra (barring

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clergymen from ministry in the absence of subscribing to a loyalty oath); United States v Lovett, supra (barring named individuals from Government employment); United States v Brown, supra (barring Communist Party members from offices in labor unions).

Needless to say, appellant cannot claim to have suffered any of these forbidden deprivations at the hands of the Congress. While it is true that Congress ordered the General Services Administration to retain control over records that appellant claims as his property,[39] § 105 of the Act makes provision for an award by the District Court of "just compensation." This undercuts even a colorable contention that the Government has punitively confiscated appellant's property, for the "owner [thereby] is to be put in the same position monetarily as he would have occupied if his property had not been taken." United States v Reynolds, 397 US 14, 16, 25 L Ed 2d 12, 90 S Ct 803 (1970); accord, United States v Miller, 317 US 369, 373, 87 L Ed 336, 63 S Ct 276, 147 ALR 55 (1943). Thus, no feature of the challenged Act falls within the historical meaning of legislative punishment.

2

[35, 36a, 37a] But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive

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legislative purposes.[40] Cummings v Missouri, 4 Wall, at 319–320, 18 L

38. Following the Revolutionary War, States often seized the property of alleged Tory sympathizers. See, e. g., James's Claim, 1 Dall 47, 1 L Ed 31 (1780) *("John Parrock* was attainted of *High Treason,* and his estate seized and advertised for sale"); Respublica v Gordon, 1 Dall 233, 1 L Ed 115 (1788) ("attainted of treason for adhering to the king of *Great Britain,* in consequence of which his estate was confiscated to the use of the commonwealth . . .").

39. In fact, it remains unsettled whether the materials in question are the property of appellant or of the Government. See n 8, supra.

40. **[36b, 37b]** In determining whether punitive or nonpunitive objectives underlie a law, United States v Brown established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. 381 US, at 458–459, 14 L Ed 2d 484, 85 S Ct 1707. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect. See, e. g., H. Packer, The Limits of the Criminal Sanction 48–61 (1968). In Brown the element of punishment was found in the fact that "the purpose of the statute before us is to purge the governing boards of labor unions

Ed 356; Hawker v New York, 170 US 189, 193–194, 42 L Ed 1002, 18 S Ct 573 (1898); Dent v West Virginia, 129 US 114, 128, 32 L Ed 623, 9 S Ct 231 (1889); Trop v Dulles, 356 US 86, 96–97, 2 L Ed 2d 630, 78 S Ct 590 (1958) (plurality opinion); Kennedy v Mendoza-Martinez, 372 US 144, 168–169, 9 L Ed 2d 644, 83 S Ct 554 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Application of the functional approach to this case leads to rejection of appellant's argument that the Act rests upon a congressional determination of his blameworthiness and a desire to punish him. For, as noted previously, see supra, at 452–454, 53 L Ed 2d 897–898, legitimate justifications for passage of the Act are readily apparent. First, in the face of the Nixon-Sampson agreement which expressly contemplated the destruction of some of appellant's materials, Congress stressed the need to preserve "[i]nformation included in the materials of former President Nixon [that] is needed to complete the prosecutions

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of Watergate-related crimes." HR Rep No. 93-1507, p 2 (1974). Second, again referring to the Nixon-Sampson agreement, Congress expressed its desire to safeguard the "public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance. The information in these materials will be of great value to the political health and vitality of the United States." Ibid.[41] Indeed, these same objectives are stated in the text of the Act itself, § 104(a), note following 44 USC § 2107 (1970 ed Supp V) [44 USCS § 2107], where Congress instructs the General Services Administration to promulgate regulations that further these ends and at the same time protect the constitutional and legal rights of any individual adversely affected by the Administrator's retention of appellant's materials.

[38–40a] Evaluated in terms of these asserted purposes, the law plainly must be held to be an act of nonpunitive legislative policymaking. Legislation designed to guarantee the availability of evidence for use at criminal trials is a fair exer-

of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill [union] positions . . . ." 381 US, at 460, 14 L Ed 2d 484, 85 S Ct 1707. Thus, Brown left undisturbed the requirement that one who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct. Indeed, just three Terms later, United States v O'Brien, 391 US 367, 383 n 30, 20 L Ed 2d 672, 88 S Ct 1673 (1968), which, like Brown, was also written by Mr. Chief Justice Warren, reconfirmed the need to examine the purposes served by a purported bill of attainder in determining whether it in fact represents a punitive law.

41. The Senate pointed to these same objectives in nullifying the Nixon-Sampson agreement: "[1] To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. [2] Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurrence of the Watergate affair may be inhibited." S Rep No. 93-1181, p 4 (1974).

cise of Congress' responsibility to the "due process of law in the fair administration of criminal justice," United States v Nixon, 418 US, at 713, 41 L Ed 2d 1039, 94 S Ct 3090, and to the functioning of our adversary legal system which depends upon the availability of relevant evidence in carrying out its commitments both to fair play and to the discovery of truth within the bounds set by law. Branzburg v Hayes, 408 US 665, 688, 33 L Ed 2d 626, 92 S Ct 2646 (1972); Blackmer v United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932); Blair v United States, 250 US 273, 281, 63 L Ed 979, 39 S Ct 468 (1919). Similarly, Congress' interest

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in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established. United States v Gettysburg Electric R. Co. 160 US 668, 40 L Ed 576, 16 S Ct 427 (1896); Roe v Kansas, 278 US 191, 73 L Ed 259, 49 S Ct 160 (1929).[42] A legislature thus acts responsibly in seeking to accomplish either of these objectives. Neither supports an implication of a legislative policy designed to inflict punishment on an individual.

3

[42] A third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish. See, e. g., United States v Lovett, 328 US, at 308–314, 90 L Ed 1252, 66 S Ct 1073; Kennedy v Mendoza-Martinez, supra, at 169–170, 9 L Ed 2d 644, 83 S Ct 554. The District Court unequivocally found: "There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a penalty upon Mr. Nixon . .n. as punishment for alleged past wrongdoings. . . . The legislative history leads to only one conclusion, namely, that the Act before us is regulatory and not punitive in character." 408 F Supp, at 373 (emphasis omitted). We find no cogent reason for disagreeing with this conclusion.

First, both Senate and House Committee reports, in formally explaining their reasons for urging passage of the Act, expressed no interest in punishing or penalizing appellant. Rather, the reports justified the Act by reference to objectives that fairly and properly lie within Congress' legislative competence: preserving the availability of judicial evidence and

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of historically relevant materials. Supra, at 476–478, 53 L Ed 2d 912–913. More specifically, it seems clear that the actions of both Houses of Congress were predominantly precipitated by a resolve to undo the recently negotiated Nixon-Sampson agreement, the terms of which departed from the practice of former Presidents in that they expressly contemplated the destruction of certain Presidential materials.[43] Along these lines, HR Rep No. 93-

42. **[40b]** These cases upheld exercises of the power of eminent domain in preserving historical monuments and like facilities for public use. The power of eminent domain, however, is not restricted to tangible property or realty but extends both to intangibles and to personal effects as involved here. See Cincinnati v Louisville & Nashville R. Co. 223 US 390, 400, 56 L Ed 481, 32 S Ct 267 (1912); Porter v United States, 473 F2d 1329 (CA5 1973).

43. Particularly troublesome was the provision of the agreement requiring the automatic destruction of tape recordings upon appellant's death.

1507, supra, at 2, stated: "Despite the overriding public interest in preserving these materials . . . [the] Administrator of General Services entered into an agreement . . . which, if implemented, could seriously limit access to these records and . . . result in the destruction of a substantial portion of them." See also S Rep No. 93-1181, p 4 (1974). The relevant committee reports thus cast no aspersions on appellant's personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment. Rather, they focus almost exclusively on the meaning and effect of an agreement recently announced by the General Services Administration which most Members of Congress perceived to be inconsistent with the public interest.

Nor do the floor debates on the measure suggest that Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses. When one of the opponents of the legislation, mischaracterizing the safeguards embodied in the bill,[44] stated that it is "one which partakes of the characteristics of a bill of attainder . . . ," 120

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Cong Rec 33872 (1974) (Sen. Hruska), a key sponsor of the measure responded by expressly denying any intention of determining appellant's blameworthiness or imposing punitive sanctions:

> "This bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him. So it has no more relation to a bill of attainder . . . than my style of pulchritude is to be compared to that of the Queen of Sheba." Id., at 33959–33960 (Sen. Ervin).

[42] In this respect, the Act stands in marked contrast to that invalidated in United States v Lovett, 328 US, at 312, 90 L Ed 1252, 66 S Ct 1073, where a House report expressly characterized individuals as "subversive . . . and . . . unfit . . . to continue in Government employment." HR Rep No. 448, 78th Cong, 1st Sess, 6 (1943). We, of course, do not suggest that such a formal legislative announcement of moral blameworthiness or punishment is necessary to an unlawful bill of attainder. United States v Lovett, supra, at 316, 90 L Ed 1252, 66 S Ct 1073. But the decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts a major concern that prompted the bill of attainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob. Cf. Z. Chafee, supra, at 161.[45] No such legislative

44. In condemning the enactment as a bill of attainder, Senator Hruska argued that the bill seizes appellant's papers and distributes them to litigants without affording appellant the opportunity judicially "to assert a defense or privilege to the production of the papers." 120 Cong Rec 33871 (1974). In fact, the Act expressly recognizes appellant's right to present all such defenses and privileges through an expedited judicial proceeding. See infra, at 481–482, 53 L Ed 2d 915.

45. The Court in United States v Brown, 381 US, at 444, 14 L Ed 2d 484, 85 S Ct 1707, referred to Alexander Hamilton's concern that legislatures might cater to the "momentary passions" of a " 'free people, in times of heat and violence . . . .' " In this case, it is obvious that the supporters of this Act steadfastly avoided inflaming or appealing to any "passions" in the community. Indeed, rather than seek expediently to impose punishment and to circumvent the courts, Congress ex-

overreaching is involved here.

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[43] We also agree with the District Court that "specific aspects of the Act . . . just do not square with the claim that the Act was a punitive measure." 408 F Supp, at 373. Whereas appellant complains that the Act has for some two years deprived him of control over the materials in question, Brief for Appellant 140, the Congress placed the materials under the auspices of the General Services Administration, § 101, note following 44 USC § 2107 (1970 ed Supp V) [44 USCS § 2107], the same agency designated in the Nixon-Sampson agreement as depository of the documents for a minimum three-year period, App 40. Whereas appellant complains that the Act deprives him of "ready access" to the materials, Brief for Appellant 140, the Act provides that "Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials . . . ," § 102(c).[46] The District Court correctly construed this as safeguarding appellant's right to inspect, copy, and use the materials in issue, 408 F Supp, at 375, paralleling the right to "make reproductions" contained in the Nixon-Sampson agreement, App 40. And even if we assume that there is merit in appellant's complaint that his property has been confiscated, Brief for Appellant 140, the Act expressly provides for the payment of just compensation under § 105(c); see supra, at 475, 53 L Ed 2d 911.

Other features of the Act further belie any punitive interpretation. In promulgating regulations under the Act, the General Services Administration is expressly directed by Congress to protect appellant's or "any party's opportunity to assert any legally or constitutionally based right or privilege . . . ." § 104(a)(5). More importantly, the Act preserves for appellant all of the protections that inhere in a judicial proceeding, for § 105(a) not only assures district

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court jurisdiction and judicial review over all his legal claims, but commands that any such challenge asserted by appellant "shall have priority on the docket of such court over other cases." A leading sponsor of the bill emphasized that this expedited treatment is expressly designed "to protect Mr. Nixon's property, or other legal rights . . . ." 120 Cong Rec 33854 (1974) (Sen. Ervin). Finally, the Congress has ordered the General Services Administration to establish regulations that recognize "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to" the articulated objectives of the Act, § 104(a)(7). While appellant obviously is not set at ease by these precautions and safeguards, they confirm the soundness of the opinion given the Senate by the law division of the Congressional Research Service: "[B]ecause the proposed bill does not impose criminal penalties or other punishment, it would not appear to violate the Bill

pressly provided for access to the judiciary for resolution of any constitutional and legal rights appellant might assert. S Rep No. 93-1181, pp 2–6 (1974).

46. Regulations guaranteeing appellant's unrestricted access to the materials have been promulgated by the Administrator and have not been challenged. See 41 CFR §§ 105–63.3 (1976).

of Attainder Clause." 120 Cong Rec 33853 (1974).[47]

One final consideration should be mentioned in light of the unique posture of this controversy. In determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature (here Congress) could have achieved its legitimate nonpunitive objectives. Today, in framing his challenge to the Act, appellant contends that such an alternative was readily available:

> "If Congress had provided that the Attorney General or the Administrator of General Services could institute a civil suit in an appropriate federal court to enjoin disposition
>
> [433 US 483]
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> . . . of presidential historical materials . . . by any person who could be shown to be an 'unreliable custodian' or who had 'engaged in misconduct' or who 'would violate a criminal prohibition,' the statute would have left to judicial determination, after a fair proceeding, the factual allegations regarding Mr. Nixon's blameworthiness." Brief for Appellant 137.

We have no doubt that Congress might have selected this course. It very well may be, however, that Congress chose not to do so on the view that a full-fledged judicial inquiry into appellant's conduct and reliability would be no less punitive and intrusive than the solution actually adopted. For Congress doubtless was well aware that just three months earlier, appellant had resisted efforts to subject himself and his records to the scrutiny of the Judicial Branch, United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974), a position apparently maintained to this day.[48] A rational and fairminded Congress, therefore, might well have decided that the carefully tailored law that it enacted would be less objectionable to appellant than the alternative that he today appears to endorse. To be sure, if the record were unambiguously to demonstrate that the Act represents the infliction of legislative punishment, the fact that the judicial alternative poses its own difficulties would be of no constitutional significance. But the record suggests the contrary, and the unique choice that Congress faced buttresses our conclusion that the Act cannot fairly be read to inflict legislative punishment as forbidden by the Constitution.

[26b, 44] We, of course, are not blind to appellant's plea that we

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recognize the social and political realities of 1974. It was a period of political turbulence unprecedented in our history. But this Court is not free to invalidate Acts of Congress based upon inferences that we may be asked to draw from our personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act,

47. In brief, the legislative history of the Act offers a paradigm of a Congress aware of constitutional constraints on its power and carefully seeking to act within those limitations. See generally Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan L Rev 585 (1975).

48. For example, in his deposition taken in this case, appellant refused to answer questions pertaining to the accuracy and reliability of his prior public statements as President concerning the contents of the tape recordings and other materials in issue. He invoked a claim of privilege and asserted that the questions were irrelevant to the judicial inquiry. See, e. g., App 586–590.

we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect. We are persuaded that none of these factors is suggestive that the Act is a punitive bill of attainder, or otherwise facially unconstitutional. The judgment of the District Court is affirmed.

SEPARATE OPINIONS

Mr. Justice **Stevens**, concurring.

The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all other former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.

Bills of attainder were typically directed at once powerful leaders of government. By special legislative Acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership. The motivation for such bills was as much political as it was punitive—and often the victims were those who had been the most relentless in attacking their political enemies at the height of
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their own power.[1] In light of this history, legislation like that before us must be scrutinized with great care.

Our cases "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." United States v Lovett, 328 US 303, 315–316, 90 L Ed 1252, 66 S Ct 1073. The concept of punishment involves not only the character of the deprivation, but

1. At the debate on the impeachment of the Earl of Danby, the Earl of Carnarvon recounted this history:

"My Lords, I understand but little of Latin, but a good deal of English, and not a little of the English history, from which I have learnt the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I shall go no farther back than the latter end of Queen Elizabeth's reign: At which time the Earl of Essex was run down by Sir Walter Raleigh, and your Lordships very well know what became of Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your Lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your Lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your Lordships know what became of Sir Harry Vane. Chancellor Hyde, he ran down Sir Harry Vane, and your Lordships know what became of the Chancellor. Sir Thomas Osborne, now Earl of Danby, ran down Chancellor Hyde; but what will become of the Earl of Danby, your Lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him." (Footnote omitted.) As quoted in Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p 127 (1956).

also the manner in which that deprivation is imposed. It has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, Flemming v Nestor, 363 US 603, 4 L Ed 2d 1435, 80 S Ct 1367, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit. Cf. id., at 614, 4 L Ed 2d 1435, 80 S Ct 1367. The very

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specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases. United States v Brown, 381 US 437, 442–446, 14 L Ed 2d 484, 85 S Ct 1707.

Like the Court, however, I am persuaded that "appellant constituted a legitimate class of one . . . ." Ante, at 472, 53 L Ed 2d 909. The opinion of the Court leaves unmentioned the two facts which I consider decisive in this regard. Appellant resigned his office under unique circumstances and accepted a pardon[2] for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents. Cf. Orloff v Willoughby, 345 US 83, 90–91, 97 L Ed 842, 73 S Ct 534. Even though unmentioned, it would be unrealistic to assume that historic facts of this consequence did not affect the legislative decision.[3]

Since these facts provide a legitimate justification for the specificity of the statute, they also avoid the conclusion that this otherwise nonpunitive statute is made punitive by its specificity. If I did not consider it appropriate to take judicial notice of those facts, I would be unwilling to uphold the power of Congress to enact special legislation directed only at one former President at a time when his popularity was at its nadir. For even when it deals with Presidents or former Presidents, the legislative focus should be upon "the calling" rather than "the person." Cf. Cummings v Missouri, 4 Wall 277, 320, 18 L Ed 356. In short, in my view, this case will not be a precedent for future legislation which relates, not to the Office of President, but just to one of its occupants.

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Without imputing a similar reservation to the Court, I join its opinion with the qualification that these unmentioned facts have had a critical influence on my vote to affirm.

Mr. Justice **White**, concurring in part and concurring in the judgment.

I concur in the judgment and, except for Part VII, in the Court's opinion. With respect to the bill of attainder issue, I concur in the result reached in Part VII; the statute does not impose "punishment" and is not, therefore, a bill of attainder. See United States v Brown, 381 US 437, 462, 14 L Ed 2d 484, 85 S Ct 1707 (1965) (White, J., dissenting). I also append the following observations with respect to one of the many issues in this case.

2. See Burdick v United States, 236 US 79, 94, 59 L Ed 476, 35 S Ct 267.

3. Cf. Calder v Bull, 3 Dall 386, 390, 1 L Ed 648:
"That Charles 1st, king of England, was beheaded; that Oliver Cromwell was Protecter of England; that Louis 16th, late King of France, was guillotined; are all facts, that have happened; but it would be nonsense to suppose, that the States were prohibited from making any law after either of these events, and with reference thereto."

It is conceded by all concerned that a very small portion of the vast collection of Presidential materials now in possession of the Administrator consists of purely private materials, such as diaries, recordings of family conversations, private correspondence—"personal property of any kind not involving the actual transaction of government business." Tr of Oral Arg 55. It is also conceded by the federal and other appellees that these private materials, once identified, must be returned to Mr. Nixon. Id., at 38–40, 57–59. The Court now declares that "the Government [without awaiting a court order] should now promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him." Ante, at 459, n 22, 53 L Ed 2d 901. I agree that the separation and return of these materials should proceed without delay. Furthermore, even if under the Act this process can occur only after the issuance of regulations under § 104 that are subject to congressional approval, surely regulations covering this narrow subject matter need not take long to effectuate.

Also, § 104(a)(7) suggests that the private materials to be returned to Mr. Nixon are limited to those that "are not otherwise of general historical significance." But, as I see it, the validity of the Act would be questionable if mere historical

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significance sufficed to withhold purely private letters or diaries; and in view of the other provisions of the Act, particularly § 104(a)(5), it need not be so construed. Purely private materials, whether or not of historical interest, are to be delivered to Mr. Nixon. The federal and other appellees conceded as much at oral argument.*

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* "QUESTION: Well now, suppose Mr. Nixon has prepared a diary every day and put down what, exactly what he did, and let's suppose that someone thought that was a purely personal account. Now, I can just imagine that someone might think that it nevertheless is of general historical significance.

"MR. McCREE: May I refer the Court to need No. 5? 'The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials.'

"And I submit that this Act affords Richard M. Nixon the opportunity to assert the contention that this diary of his is personal and has not the kind of general historical significance that will permit his deprivation; and that would then have to be adjudicated in a court.

"QUESTION: Well, do—

"MR. McCREE: And ultimately this Court will answer that question.

"QUESTION: Well, how do you—so you would agree, then, that 104 must be construed —must be construed to sooner or later return to Mr. Nixon what we might call purely private papers?

"MR. McCREE: Indeed I do.

"QUESTION: Can you imagine any diary—thinking of Mr. Truman's diary, which, it is reported, was a result of being dictated every evening, after the day's work—can you conceive of any such material that would not be of general historical interest?

"MR. McCREE: I must concede, being acquainted with some historians, that it's difficult to conceive of anything that might not be of historical interest. But—

"[Laughter.]

"QUESTION: Yes. Archivists and historians, like journalists,—

"MR. McCREE: Indeed they are.

"QUESTION: —think that everything is.

"[Laughter.]

"MR. McCREE: But this legislation recognizes that a claim of privacy, a claim of privilege must be protected, and if the regulations are insufficient to do that, again a court will have an opportunity to address itself to a particular item such as the diary before it can be turned over.

"And for that reason, we suggest that the attack at this time is premature because the statute, in recognizing the right of privacy, is facially adequate. And the attack that was made the day after it became effective brought to this Court a marvelous opportunity to speculate about what might happen, but the regulations haven't even been promul-

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Similarly, although the Court relies to some extent on the statutory recognition of the constitutional right to compensation in the event it is determined that the Government has

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confiscated Mr. Nixon's property, I would question whether a mere historical interest in purely private communications would be a sufficient predicate for taking them for public use. Historical considerations are normally sufficient grounds for condemning property, United States v Gettysbury Electric R. Co. 160 US 668, 40 L Ed 576, 16 S Ct 427 (1896); Roe v Kansas, 278 US 191, 73 L Ed 259, 49 S Ct 160

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(1929); but whatever may be true of the great bulk of the materials in the event they are declared to be Mr. Nixon's

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gated and acquiesced in so that they have become effective." Tr of Oral Arg 38–40.

"[MR. HERZSTEIN, for the private appellees:]

"But there's just no question about the return of personal diaries, Dictabelts, so long as they are not the materials involved in the transaction of government business.

"Now, the statute, I agree, could have been drafted a little more clearly, but we think there are several points which make it quite clear that his personal materials are to be returned to him.

"One is the fact that statute refers to the presidential historical materials of Richard Nixon, not to the person[al] or private materials.

"The second is that, as Judge McCree mentioned, criterion 7 calls for a return of materials to him, and if you read those two in conjunction with the legislative history, there are statements on the Floor of the Senate, on the Floor of the House, and in the Committee Reports, indicating the expectation that Nixon's personal records would be returned to him.

"QUESTION: Could you give us a capsule summary of the difference between what you have just referred to as Nixon's personal records, which will be returned, and the matter which will not be returned?

"MR. HERZSTEIN: Well, yes. Certainly any personal letters, among his family or friends, certainly a diary made at the end of the day, as it were, after the event—

"QUESTION: Even though the Dictabelt was paid for out of White House appropriations?

"MR. HERZSTEIN: That's right. That doesn't bother us. I think it's incidental now. But we do have a different view on the tapes, which actually recorded the transaction of government business by government employees on government time and so on. The normal tapes that we've heard so much about.

"The Dictabelts, Mr. Nixon has said, are his personal diary. Instead of writing it down, in other words, he dictated it at the end of the day. And we think that's—

"QUESTION: I want to be sure about that concession, because this certainly is of historical interest.

"MR. HERZSTEIN: That's right, it is, but we do not feel it's covered by the statute. We have acknowledged that from the start.

"QUESTION: Is this concession shared by the Solicitor General, do you think?

"MR. HERZSTEIN: We believe it is.

"QUESTION: What about that?

"MR. McCREE: About the fact that the paper belongs to the government and so forth, we don't believe that makes a document a government documen[t]. We certainly agree with that.

"Beyond that, if the Court please—

"QUESTION: What about the Dictabelts representing his daily diary?

"MR. McCREE: I would think that's a personal matter that would be—should be returned to him once it was identified.

"QUESTION: Well, is there any problem about, right this very minute, of picking those up and giving them back to Mr. Nixon?

"MR. McCREE: I know of no problem. Whether it would have to await the adoption of the regulation, which has been stymied by Mr. Nixon's lawsuit, which has been delayed for three years,—

"QUESTION: How has that stymied the issuance of regulations, Mr. Solicitor General?

"MR. McCREE: One of the dispositions of the district court was to stay the effectiveness of regulations. Now, I think it held up principally the regulations for public access. The other regulations are not part of this record, and I cannot speak to the Court with any knowledge about them." Id., at 57–59.

property, I doubt that the Government is entitled to his purely private communications merely because it wants to preserve them and offers compensation.

Mr. Justice **Blackmun,** concurring in part and concurring in the judgment.

My posture in this case is essentially that of Mr. Justice Powell, post, p 492, 53 L Ed 2d 921. I refrain from joining his opinion, however, because I fall somewhat short of sharing his view, post, at 498 and 501–502, 53 L Ed 2d 925 and 927–928, that the incumbent President's submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Art II functions, is *dispositive* of the separation-of-powers issue. I would be willing to agree that it is significant and that it is entitled to serious consideration, but I am not convinced that it is dispositive. The fact that President Ford signed the Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto.

One must remind oneself that our Nation's history reveals a number of instances where Presidential transition has not been particularly friendly or easy. On occasion it has been openly hostile. It is my hope and anticipation—as it obviously is of the others who have written in this case—that this Act, concerned as it is with what the Court describes, ante, at 472, 53 L Ed 2d 909, as "a legitimate class of one," will not become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion.

I agree fully with my Brother Powell when he observes, post, at 503, 53 L Ed 2d 928, that the "difficult constitutional questions lie ahead" for resolution in the future. Reserving judgment on

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those issues for a more appropriate time—certainly not now—I, too, join the judgment of the Court and agree with much of its opinion. I specifically join Part VII of the Court's opinion.

Mr. Justice **Powell,** concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Parts IV and V of its opinion. For substantially the reasons stated by the Court, I agree that the Presidential Recordings and Materials Preservation Act (Act) on its face does not violate appellant's rights under the First, Fourth, and Fifth Amendments and the Bill of Attainder Clause.[1] For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the principle of separation of powers.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists."

1. Although I agree with much of Parts IV and V, I am unable to join those parts of the Court's opinion because of my uncertainty as to the reach of its extended discussion of the competing constitutional interests implicated by the Act.

Ante, at 439, 53 L Ed 2d 888. I agree that the inquiry must be limited in this manner, but I would add two qualifications that in my view further restrict the reach of today's decision.

First, Title I of Pub L 93-526 (the Act) does not purport to be a generalized provision addressed to the complex problem of disposition of the accumulated papers of Presidents or other federal officers. Unlike Title II of Pub L 93-526 (the Public Documents Act), which authorizes a study of that problem,

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Title I is addressed specifically and narrowly to the need to preserve the papers of former President Nixon after his resignation under threat of impeachment. It is legislation, as the Court properly observes, directed against "a legitimate class of one." Ante, at 472, 53 L Ed 2d 909.

President Nixon resigned on August 9, 1974. Less than two weeks earlier, the House Judiciary Committee had voted to recommend his impeachment, HR Rep No. 93-1305, pp 10–11 (1974), including among the charges of impeachable offenses allegations that the President had obstructed investigation of the Watergate break-in and had engaged in other unlawful activities during his administration. Id., at 1–4. One month after President Nixon's resignation, on September 8, 1974, President Ford granted him a general pardon for all offenses against the United States that he might have committed in his term of office.

On the same day, the Nixon-Sampson agreement was made public. The agreement provided for the materials to be deposited temporarily with the General Services Administration in a California facility, but gave the former President the right to withdraw or direct the destruction of any materials after an initial period of three years or, in the case of tape recordings, five years. During this initial period access would be limited to President Nixon and persons authorized by him, subject only to legal process ordering materials to be produced. Upon President Nixon's death, the tapes were to be destroyed immediately. 10 Weekly Compilation of Presidential Documents 1104–1105 (1974).

Those who drafted and sponsored Title I in Congress uniformly viewed its provisions as emergency legislation, necessitated by the extraordinary events that led to the resignation and pardon and to the former President's arrangement for the disposition of his papers. Senator Nelson, for example, referred to the bill as "an emergency measure" whose principal

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purpose was to assure "protective custody" of the materials. 120 Cong Rec 33848, 33850–33851 (1974).

> "[T]here is an urgency in the situation now before us. Under the existing agreement between the GSA and Mr. Nixon, if Mr. Nixon died tomorrow, those tapes—if I read the agreement correctly—are to be destroyed immediately; it is also possible that the Nixon papers could be destroyed by 1977. This would be a catastroph[e] from an historical standpoint." Id., at 33857.

Senator Ervin similarly remarked:

> "This bill really deals with an emergency situation, because some of these documents are needed in the courts and by the general pub-

lic in order that they might know the full story of what is known collectively as the Watergate affair." Id., at 33855.

Efforts to apply the legislation more generally to all Presidents or to other federal officers were resisted on the Senate floor. Thus, speaking again of the unique needs created by the Nixon-Sampson agreement and the Watergate scandals, Senator Javits stressed that "we seek to deal in this particular legislation, only with this particular set of papers of this particular ex-President." Id., at 33860. See generally S Rep No. 93-1181 (1974).

It is essential in addressing the constitutional issues before us not to lose sight of the limited justification for and objectives of this legislation. The extraordinary events that led to the resignation and pardon, and the agreement providing that the record of those events might be destroyed by President Nixon, created an impetus for congressional action that may—without overstatement—be termed unique. I therefore do not share my Brother Rehnquist's foreboding that this Act "will daily stand as a veritable sword of Damocles over every succeeding President and his advisors." Post, at 545, 53 L Ed 2d 954. If the study authorized by Title II should lead to

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more general legislation, there will be time enough to consider its validity if a proper case comes before us.

My second reservation follows from the first. Because Congress acted in what it perceived to be an emergency, it concentrated on the immediate problem of establishing governmental custody for the purpose of safeguarding the materials. It deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisors, the three branches of Government, and the American public, once custody was established. As the District Court observed:

> "The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a). Those factors provide broad latitude to the Administrator in establishing the processes and standards under which the materials will be reviewed and public access to them afforded. . . ." 408 F Supp 321, 335 (1976) (footnote omitted).

In view of the latitude that the Act gives to GSA in framing regulations, I agree with the District Court that the question to be resolved in this case is a narrow one: "Is the regulatory scheme enacted by Congress unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)?" Id., at 334–335.

No regulations have yet taken effect under § 104(a). Ante, at 437, 53 L Ed 2d 887. In these circumstances, I believe it is appropriate to address appellant's constitutional claims, as did the District Court, with an eye toward the kind of regulations and screening practices that would be consistent with the Act and yet that would afford protection to the important

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constitutional interests asserted. Section 104(a)(5) of

the Act directs the Administrator to take into account

> "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

The District Court observed that in considering this factor, the Administrator might well provide for meaningful participation by appellant in the screening process and in the selection of the archivists who would review the materials. The court also observed that procedures might be adopted that would minimize any intrusion into private materials and that would permit appellant an opportunity to obtain administrative and judicial review of all proposed classifications of the materials. 408 F Supp, at 339–340.[2] Finally,

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the court noted that substantive restrictions on access might be adopted, consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communications between appellant and his advisors "for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications." Id., at 338.[3]

I have no doubt that procedural safeguards and substantive restrictions such as these are within the

2. By way of illustration, the District Court observed that the following archival practices might be adopted to limit invasion of appellant's constitutionally protected interests:

"1. A practice of requiring archivists to make the minimal instrusion necessary to classify material. Identification by signature, the file within which material is found, general nature (as with diaries, or dictabelts serving the same function), a cursory glance at the contents, or other means could significantly limit infringement of plaintiff's interests without undermining the effectiveness of screening by governmental personnel. Participation by Mr. Nixon in preliminary identification of material that might be processed without word-by-word review would facilitate such a procedure.

"2. A practice of giving Mr. Nixon some voice in the designation of the personnel who will review the materials, perhaps by selecting from a body of archivists approved by the government.

"3. A practice of giving Mr. Nixon notice of all proposed classifications of materials and an opportunity to obtain administrative and judicial review of them, on constitutional or other grounds, before they are effectuated." 408 F Supp, at 339–340 (footnotes omitted).

I agree with the views expressed by Mr. Justice White, ante, at 487–491, 53 L Ed 2d 918–921, on the need to return private materials to appellant.

3. The District Court noted the existence of:

"a basic set of donor-imposed access restrictions that was first formulated by Herbert Hoover [and] followed by Presidents Eisenhower, Kennedy, and Johnson. Under this scheme the following materials would be restricted:

"1) materials that are security-classified;

"2) materials whose disclosure would be prejudicial to foreign affairs;

"3) materials containing statements made by or to a President in confidence;

"4) materials relating to the President's family, personal, or business affairs or to such affairs of individuals corresponding with the President;

"5) materials containing statements about individuals that might be used to embarrass or harass them or members of their families;

"6) such other materials as the President or his representative might designate as appropriate for restriction.

"President Franklin Roosevelt imposed restrictions very similar to numbers 1, 2, 4, and 5, and in addition restricted (a) investigative reports on individuals, (b) applications and recommendations for positions, and (c) documents containing derogatory remarks about an individual. President Truman's restrictions were like those of Hoover, Eisenhower, Kennedy, and Johnson, except that he made no provision, like number 6 above, for restriction merely at his own instance." 408 F Supp, at 338–339 n 19 (citations omitted).

authority of the Administrator to adopt under the broad mandate of § 104(a). While there can be no positive assurance that such protections will in fact be afforded, we nonetheless may assume, in reviewing the facial validity of the Act, that all constitutional and legal rights will be given full protection. Indeed, that assumption is the basis on which I join today's judgment

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upholding the facial validity of the Act. As the Court makes clear in its opinion, the Act plainly requires the Administrator, in designing the regulations, to "consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained." Ante, at 436, 53 L Ed 2d 887.

II

I agree that the Act cannot be held unconstitutional on its face as a violation of the principle of separation of powers or of the Presidential privilege that derives from that principle. This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art II. E.g., Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976); Myers v United States, 272 US 52, 71 L Ed 160, 47 S Ct 21 (1926). The question of governmental power in this case is whether the Act, by mandating seizure and eventual public access to the papers of the Nixon Presidency, impermissibly interferes with the President's power to carry out his Art II obligations. In concluding that the Act is not facially invalid on this ground, I consider it dispositive in the circumstances of this case that the incumbent President has represented to this Court, through the Solicitor General, that the Act serves rather than hinders the Art II functions of the Chief Executive.

I would begin by asking whether, putting to one side other limiting provisions of the Constitution, Congress has acted beyond the scope of its enumerated powers. Cf. Reid v Covert, 354 US 1, 70, 1 L Ed 2d 1148, 77 S Ct 1222 (1957) (Harlan, J., concurring). Apart from the legislative concerns mentioned by the Court, ante, at 476–478, 53 L Ed 2d 912–913, I believe that Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch.

[433 US 499]

This Court has recognized inherent power in Congress to pass appropriate legislation to "preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." Burroughs v United States, 290 US 534, 545, 78 L Ed 484, 54 S Ct 287 (1934). Congress has the power, for example, to restrict the political activities of civil servants, e.g., CSC v Letter Carriers, 413 US 548, 37 L Ed 2d 796, 93 S Ct 2880 (1973); to punish bribery and conflicts of interest, e.g., Burton v United States, 202 US 344, 50 L Ed 1057, 26 S Ct 688 (1906); to punish obstructions of lawful governmental functions, Haas v Henkel, 216 US 462, 54 L Ed 569, 30 S Ct 249 (1910); and—with important exceptions—to make executive documents available to the public, EPA v Mink, 410 US 73, 35 L Ed 2d 119, 93 S Ct 827 (1973). The Court also has

recognized that in aid of such legislation Congress has a broad power "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." Watkins v United States, 354 US 178, 200 n 33, 1 L Ed 2d 1273, 77 S Ct 1173, 76 Ohio L Abs 225 (1957). See also Buckley v Valeo, supra, at 137–138, 46 L Ed 2d 659, 96 S Ct 612; Eastland v United States Servicemen's Fund, 421 US 491, 44 L Ed 2d 324, 95 S Ct 1813 (1975).

The legislation before us rationally serves these investigative and informative powers. Congress legitimately could conclude that the Nixon-Sampson agreement, following the recommendation of impeachment and the resignation of President Nixon, might lead to destruction of those of the former President's papers that would be most likely to assure public understanding of the unprecedented events that led to the premature termination of the Nixon administration. Congress similarly could conclude that preservation of the papers was important to its own eventual understanding of whether that administration had been characterized by deficiencies susceptible of legislative correction. Providing for retention of the materials by the Administrator and for the selection of appropriate materials for eventual disclosure to the public was a rational means of serving these legitimate congressional objectives.

[433 US 500]

Congress still might be said to have exceeded its enumerated powers, however, if the Act could be viewed as an assumption by the Legislative Branch of functions reserved exclusively to the Executive by Art II. In Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (1952), for example, the Court buttressed its conclusion that the President had acted beyond his power under Art II by characterizing his seizure of the steel mills as an exercise of a "legislative" function reserved exclusively to Congress by Art I. 343 US, at 588–589, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378. And last Term we reaffirmed the fundamental principle that the appointment of executive officers is an "Executive" function that Congress is without power to vest in itself. Buckley v Valeo, supra, at 124–141, 46 L Ed 2d 659, 96 S Ct 612. But the Act before us presumptively avoids these difficulties by entrusting the task of ensuring that its provisions are faithfully executed to an officer of the Executive Branch.[4]

I therefore conclude that the Act cannot be held invalid on the ground that Congress has exceeded its affirmative grant of power under the Constitution. But it is further argued that Congress nonetheless has contravened the limitations on legislative power implicitly imposed by the creation of a coequal Executive Branch in Art II. It is said that by opening up the operations of a past administration to eventual public scrutiny, the Act impairs the ability of present and future Presidents to obtain unfettered information and candid advice and thereby limits ex-

4. The validity of the provision of § 104(b) for possible disapproval of the Administrator's regulations by either House of Congress is not before us at this time. See 408 F Supp, at 338 n 17; Brief for Federal Appellees 26, and n 11.

ecutive power in contravention of Art II and the principle of separation of powers. I see no material distinction between such an argument and the collateral claim that the Act violates the Presidential privilege in confidential communications.

In United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974) (Nixon I),

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we recognized a presumptive, yet qualified, privilege for confidential communications between the President and his advisors. Observing that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process," id., at 705, 41 L Ed 2d 1039, 94 S Ct 3090, we recognized that a President's generalized interest in confidentiality is "constitutionally based" to the extent that it relates to "the effective discharge of a President's powers." Id., at 711, 41 L Ed 1039, 94 S Ct 3090. We held nonetheless that "[t]he generalized assertion of privilege must yield to the demonstrated, specified need for evidence in a pending criminal trial." Id., at 713, 41 L Ed 2d 1039, 94 S Ct 3090.

Appellant understandably relies on Nixon I. Comparing the narrow scope of the judicial subpoenas considered there with the comprehensive reach of this Act—encompassing all of the communications of his administration—appellant argues that there is no "demonstrated, specific need" here that can outweigh the extraordinary intrusion worked by this legislation. On the ground that the result will be to destroy "the effective discharge of the President's powers," appellant urges that the Act be held unconstitutional on its face.

These arguments undoubtedly have considerable force, but I do not think they can support a decision invalidating this Act on its face. Section 1 of Art II vests all of the executive power in the sitting President and limits his term of office to four years. It is his sole responsibility to "take Care that the Laws be faithfully executed." Art II, § 3. Here, as previously noted, President Carter has represented to this Court through the Solicitor General that the Act is consistent with "the effective discharge of the President's powers":

> "Far from constituting a breach of executive autonomy, the Act . . . is an appropriate means of ensuring that the Executive Branch will have access to the materials necessary to the performance of its duties." Brief for Federal Appellees 29.

[433 US 502]

This representation is similar to one made earlier on behalf of President Ford, who signed the Act. Motion of Federal Appellees to Affirm 15. I would hold that these representations must be given precedence over appellant's claim of Presidential privilege. Since the incumbent President views this Act as furthering rather than hindering effective execution of the laws, I do not believe it is within the province of this Court to hold otherwise.

This is not to say that a former President lacks standing to assert a claim of Presidential privilege. I agree with the Court that the former President may raise such a claim, whether before a court or a congressional committee. In some circumstances the intervention of the incumbent President will be impracti-

cal or his views unknown, and in such a case I assume that the former President's views on the effective operation of the Executive Branch would be entitled to the greatest deference. It is uncontroverted, I believe, that the privilege in confidential Presidential communications survives a change in administrations. I would only hold that in the circumstances here presented the incumbent, having made clear in the appropriate forum his opposition to the former President's claim, alone can speak for the Executive Branch.[5]

[433 US 503]

I am not unmindful that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v Madison, 1 Cranch 137, 177, 2 L Ed 60 (1803). As we reiterated in Nixon I:

> " 'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.' " 418 US, at 704, 41 L Ed 2d 1039, 94 S Ct 3090, quoting Baker v Carr, 369 US 186, 211, 7 L Ed 2d 663, 82 S Ct 691 (1962).

My position is simply that a decision to waive the privileges inhering in the Office of the President with respect to an otherwise valid Act of Congress is the President's alone to make under the Constitution.[6]

III

The difficult constitutional questions lie ahead. The President no doubt will see to it that the interests in confidentiality so forcefully urged by The Chief Justice and Mr. Justice Rehnquist in their dissenting opinions are taken into account in the final regulations that are promulgated under

[433 US 504]

§ 104(a). While the incumbent President has supported the constitutionality of the Act as it is written, there is no indication that he will oppose

5. There is at least some risk that political, and even personal, antagonisms could motivate Congress and the President to join in a legislative seizure and public exposure of a former President's papers without due regard to the long-range implications of such action for the Art II functions of the Chief Executive. Even if such legislation did not violate the principle of separation of powers, it might well infringe individual liberties protected by the Bill of Attainder Clause or the Bill of Rights. But this is not the case before us. In passing this legislation, Congress acted to further legitimate objectives in circumstances that were wholly unique in the history of our country. The legislation was approved by President Ford, personally chosen by President Nixon as his successor, and is now also supported by President Carter. In view of the circumstances leading to its passage and the protection it provides for " 'any . . . constitutionally based right or privilege,' " supra, at 496, 53 L Ed 2d 924, this Act on its face does not violate the personal constitutional rights asserted by appellant.

6. Cf. Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 635–637, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (1952) (Jackson, J., concurring):

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . ." (Footnote omitted.)

See also Williams v Suffolk Insurance Co. 13 Pet 415, 420, 10 L Ed 226 (1839):

"[T]his Court ha[s] laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive."

appellant's assertions of Presidential privilege as they relate to the rules that will govern the screening process and the timing of disclosure, and particularly the restrictions that may be placed on certain documents and recordings. I emphasize that the validity of such assertions of Presidential privilege is not properly before us at this time.

Similarly, difficult and important questions concerning individual rights remain to be resolved. At stake are not only the rights of appellant but also those of other individuals whose First, Fourth, and Fifth Amendment interests may be implicated by disclosure of communications as to which a legitimate expectation of privacy existed. I agree with the Court that even in the councils of Government an individual "has a legitimate expectation of privacy in his personal communications," ante, at 465, 53 L Ed 2d 905, and also that compelled disclosure of an individual's political associations, in and out of Government, can be justified only by "a compelling public need that cannot be met in a less restrictive way," ante, at 467, 53 L Ed 2d 906. Today's decision is limited to the facial validity of the Act's provisions for retention and screening of the materials. The Court's discussion of the interests served by those provisions should not foreclose in any way the search that must yet be undertaken for means of assuring eventual access to important historical records without infringing individual rights protected by the First, Fourth, and Fifth Amendments.

Mr. Chief Justice **Burger**, dissenting.

In my view, the Court's holding is a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act (Title I of Pub L 93-526) violates firmly established constitutional principles in several respects.

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I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three branches of Government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others. The Court, however, has now joined a Congress, in haste to "do something," and has invaded historic, fundamental principles of the separate powers of coequal branches of Government. To "punish" one person, Congress—and now the Court—tears into the fabric of our constitutional framework.

Any case in this Court calling upon principles of separation of powers, rights of privacy, and the prohibitions against bills of attainder, whether urged by a former President—or any citizen—is inevitably a major constitutional holding. Mr. Justice Holmes, speaking of the tendency of "[g]reat cases like hard cases [to make] bad law," went on to observe the dangers inherent when

> "some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and be-

fore which even well settled principles of law will bend." Northern Securities Co. v United States, 193 US 197, 400-401, 48 L Ed 679, 24 S Ct 436 (1904) (dissenting opinion).

Well-settled principles of law are bent today by the Court under that kind of "hydraulic pressure."

I

Separation of Powers

Appellant urges that Title I is an unconstitutional intrusion by Congress into the internal workings of the Office of the President, in violation of the constitutional principles of separation of powers. Three reasons support that conclusion.

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The well-established principles of separation of powers, as developed in the decisions of this Court, are violated if Congress compels or coerces the President, in matters relating to the operation and conduct of his office.[1] Next, the Act is an exercise of executive—not legislative—power by the Legislative Branch. Finally, Title I works a sweeping modification of the constitutional privilege and historical practice of confidentiality of every Chief Executive since 1789.

A

As a threshold matter, we should first establish the standard of constitutional review by which Title I is to be judged. In the usual case, of course, legislation challenged in this Court benefits from a presumption of constitutionality. To survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, unless the legislation trenches on fundamental constitutional rights.

But where challenged legislation implicates fundamental constitutional guarantees, a far more demanding scrutiny is required. For example, this Court has held that the presumption of constitutionality does not apply with equal force where the very legitimacy of the composition of representative institutions is at stake. Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362 (1964). Similarly, the presumption of constitutionality is lessened when the Court reviews legislation endangering fundamental constitutional rights, such as freedom of speech, or which denies persons governmental rights or benefits because of race. Legislation touching substantially on these areas comes here bearing a heavy burden which its proponents must carry.

Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government.

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In Kilbourn v Thompson, 103 US 168, 192, 26 L Ed 377 (1881), Mr. Justice Miller observed for the Court that encroachments by Congress posed the greatest threat to the continued independence of the other branches.[2] Accordingly, he cau-

1. Later, I will discuss the importance of the legislation's applicability to only one ex-President.

2. In this, Mr. Justice Miller was but expressing the earlier opinion of Madison, who declared in The Federalist No. 48:

"The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect mea-

tioned that the exercise of power by one branch directly affecting the potential independence of another "should be watched with vigilance, and when called in question before any other tribunal . . . should receive *the most careful scrutiny.*" Ibid. (Emphasis supplied.) See also Buckley v Valeo, 424 US 1 (1976).

Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, Title I can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles.

B

Separation of powers is in no sense a formalism. It is the characteristic that distinguished our system from all others conceived up to the time of our Constitution. With federalism, separation of powers is "one of the two great structural principles of the American constitutional system . . . ." E. Corwin, The President 9 (1957). See also Griswold v Connecticut, 381 US 479, 501 (1965) (Harlan, J., concurring in judgment).

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In pursuit of that principle, executive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are creatures of the Congress and owe their very existence to the Legislative Branch.[3]

The Presidency, in contrast, stands on a very different footing. Unlike the vast array of departments which the President oversees, the Presidency is in no sense a creature of the Legislature. The President's powers originate not from statute, but from the constitutional command to "take Care that the Laws be faithfully executed . . . ." These independent, constitutional origins of the Presidency have an important bearing on determining the appropriate extent of congressional power over the Chief Executive or his records and workpapers. For, although the branches of Government are obviously not divided into "watertight compartments," Springer v Philippine Islands, 277 US 189, 211, 72 L Ed 845, 48 S Ct

sures, the encroachments which it makes on the co-ordinate departments."

3. Statutes relating to departments or agencies created by Congress frequently are phrased in mandatory terms. For example, in the 1949 legislation creating the General Services Administration, Congress provided as follows:

"The Administrator is authorized *and directed* to coordinate and provide for the . . . efficient purchase, lease and maintenance of . . . equipment by Federal agencies." 40 USC § 759(a) [40 USCS § 759(a)].

Even with respect to international relations, Congress has affirmatively imposed certain *requirements* on the Secretary of State:

"The Secretary of State *shall furnish* to the Public Printer a correct copy of every treaty between the United States and any foreign government . . . ." 22 USC § 2660 [22 USCS § 2660].

480 (1928) (Holmes, J., dissenting), the office of the Presidency, as a constitutional equal of Congress, must as a general proposition be free from Congress' *coercive* powers.[4] This is not simply an abstract proposition

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of political philosophy; it is a fundamental prohibition plainly established by the decisions of this Court.

A unanimous Court, including Mr. Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Brandeis stated:

> "The general rule is that neither department [of government] may . . . control, direct or restrain the action of the other." Massachusetts v Mellon, 262 US 447, 488, 67 L Ed 1078, 43 S Ct 597 (1923).

Similarly, in O'Donoghue v United States, 289 US 516, 530, 77 L Ed 1356, 53 S Ct 740 (1933), the Court emphasized the need for each branch of Government to be free from the coercive influence of the other branches:

> "[E]ach department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, *directly or indirectly,* to, the coercive influence of either of the other departments."

In Humphrey's Executor v United States, 295 US 602, 629–630, 79 L Ed 1611, 55 S Ct 869 (1935), the Court again held:

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, *direct or indirect,* of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers . . . ." (Emphasis supplied.)

Consistent with the principle of noncoercion, the unbroken practice since George Washington with respect to congressional demands for White House papers has been, in Mr. Chief Justice Taft's words, that "while either house [of Congress]

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may request information, it cannot compel it . . . ." W. Taft, The Presidency 110 (1916). President Washington established the tradition by declining to produce papers requested by the House of Representatives relating to matters of foreign policy:

> "To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents 195 (J. Richardson comp, 1899).

In noting the first President's practice, this Court stated in United States v Curtiss-Wright Corp. 299 US 304, 320, 81 L Ed 255, 57 S Ct 216 (1936), that Washington's historic precedent was "a refusal the wisdom of which was recognized by

4. Cf. Mr. Justice White's discussion in United States v Brewster, 408 US 501, 558, 33 L Ed 2d 507, 92 S Ct 2531 (1972) (dissenting opinion), where he spoke of the "evil" of "executive *control* of legislative behavior . . . ." (Emphasis supplied.)

the House itself and has never since been doubted."[5]

Part of our constitutional fabric, then, from the beginning has been the President's freedom from control or coercion by Congress, including attempts to procure documents that, though clearly pertaining to matters of important governmental interests, belong and pertain to the President. This freedom from Congress' coercive influence, in the words of Humphrey's Executor, "is implied in the very fact of the separation of the powers . . . ." 295 US, at 629–630, 79 L Ed 1611, 55 S Ct 869. Moreover, it is not constitutionally significant that Congress has not directed that the papers be turned over to it for examination or retention, rather than to GSA. Separation of powers is fully implicated simply by Congress' mandating what disposition is to be made of the papers of another branch.

This independence of the three branches of Government, including control over the papers of each, lies at the heart of

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this Court's broad holdings concerning the immunity of *congressional* papers from outside scrutiny. The Constitution, of course, expressly grants immunity to Members of Congress as to any "Speech or Debate in either House . . . ."; yet the Court has refused to confine that Clause literally "to words spoken in debate." Powell v McCormack, 395 US 486, 502, 23 L Ed 2d 491, 89 S Ct 1944 (1969). Congressional papers, including congressional reports, have been held protected by the Clause in order " 'to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.' " Ibid. In a word, to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.

Title I is an unprecedented departure from the constitutional tradition of noncompulsion. The statute commands the head of a *legislatively* created department to take and maintain custody of appellant's Presidential papers, including many purely personal papers wholly unrelated to any operations of the Government. Title I does not concern itself in any way with materials belonging to departments of the Executive Branch created and controlled by Congress.

The Court brushes aside the fundamental principle of noncompulsion, abandoning outright the careful, previously unchallenged holdings of this Court in Mellon, O'Donoghue and Humphrey's Executor. In place of this firmly established doctrine,[6] the Court substitutes, without

5. This Presidential prerogative has not been limited to foreign affairs, where, of course, secrecy and confidentiality may be of the utmost importance. See A. Bickel, The Morality of Consent 79 (1975); W. Taft, The Presidency 110 (1916).

6. The Court's references to the historical understanding of separation-of-powers principles omit a crucial part of that history. Madison's statements in The Federalist No. 47 as to one department's exercising the "*whole* power" of another department do not purport to be his total treatment of the subject. The Federalist No. 48, two days later, states the central theme of Madison's view:
"It is equally evident, that neither [department] ought to possess directly or indirectly, an overruling influence over the others in the *administration of the respective powers.*" The Federalist No. 48, p 332 (J. Cooke ed 1961). (Emphasis supplied.)
Indeed, Madison expressly warned at length in No. 48 of the inevitable dangers of "encroachments" by the Legislative Branch upon the coordinate departments of Government.
But aside from the Court's highly selective discussion of the Framers' understanding, the Court cannot obscure the fact that this Court has never required, in order to show a separation-of-powers violation, that Congress usurped *the whole* of executive power. Any such requirement was rejected by the Court

analysis, an ill-defined
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"pragmatic, flexible approach." Ante, at 442, 53 L Ed 2d 890. Recasting, for the immediate purposes of this case, our narrow holding in United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974), see infra, at 515–516, 53 L Ed 2d 936, the Court distills separation-of-powers principles into a simplistic rule which requires a "potential for disruption" or an "unduly disruptive" intrusion, before a measure will be held to trench on Presidential powers.[7]

The Court's approach patently ignores Buckley v Valeo, where, only one year ago, we *unanimously* found a separation-of-powers violation without any allegation, much less a showing, of "undue disruption." There, we held that Congress could not impinge, even to the modest extent of six appointments to the Federal Election Commission, on the appointing powers of the President. We reached this conclusion in the face of the fact that President Ford had signed the bill into law.[8]

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But even taking the "undue disruption" test as postulated, the Court engages in a facile analysis, as Mr. Justice Rehnquist so well demonstrates. We are told, under the Court's view, that no "undue disruption" arises because GSA officials have taken custody of appellant's Presidential papers, and since, for the time being, only GSA and other Executive Branch officials will have access to them. Ante, at 443–444, 53 L Ed 2d 891–892.

This analysis is superficial in the extreme. Separation-of-powers principles are no less eroded simply because *Congress* goes through a "minuet" of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

If separation-of-powers principles can be so easily evaded, then the constitutional separation is a sham.

Congress' power to regulate *Executive Department documents*, as contrasted with *Presidential papers*, under such measures as the Freedom of Information Act, 5 USC § 552 (1970 ed and Supp V) [5 USCS § 552], does not bear on the question. No one chal-

in Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976). There, we held that Congress could not constitutionally exercise the President's appointing powers, even though under that statute the President had the power to appoint one-fourth of the Federal Election Commission members, and even though the President had "approved" the statute when he signed the bill into law.

7. Nowhere is the standard clarified in the majority's opinion. We are left to guess whether only a "potential for disruption" is required or whether "undue disruption," whatever that may be, is required.

8. The federal parties filed three briefs in Buckley. The main brief, styled the "Brief for the Attorney General as Appellee and for the United States as Amicus Curiae," explicitly stated that the method of appointment of four of the members of the Commission was unconstitutional. See pp 6–7, 110–120. The Attorney General signed this portion of the brief as a party (see pp 2, 103 n 65). The Executive Branch therefore made it clear that, in its view, the statute was unconstitutional to the extent it reposed appointing powers in Congress. The second brief, styled the "Brief for the Attorney General and the Federal Election Commission," generally defended the Act but took no position concerning the method of appointing the Commission. See p 1 n 1. The third brief was filed by the Commission on its

lenges Congress' power to provide for access to records of the Executive Departments which Congress itself created. But the Freedom of Information Act, the Privacy Act of 1974, and similar measures never contemplated mandatory production of Presidential papers. What is instructive, by contrast, is the nonmandatory, noncoercive manner in which Congress has previously legislated with respect to Presidential papers, by providing for Presidential libraries *at the option* of every

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former President. Title I, however, breaches the nonmandatory tradition that has long been a vital incident of separation of powers.

C

The statute, therefore, violates separation-of-powers principles because it exercises a coercive influence by another branch over the Presidency. The legislation is also invalid on another ground pertaining to separation of powers; it is an attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records, and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate.

The general principle as to this aspect of separation of powers was stated in Kilbourn v Thompson:

> "[E]ach [branch] shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.
>
> . . . . . .
>
> "[A]s a general rule . . . the powers confided by the Constitution to one of these departments cannot be exercised by another." 103 US, at 191, 26 L Ed 377.

Madison also expressed this:

> "For this reason that Convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." The Federalist No. 48, p 335 (J. Cooke ed 1961) (quoting Jefferson).

In the 1975 Term, in the face of a holding by a Court of Appeals that the separation-of-powers challenge was meritless, we unanimously invalidated an attempt by Congress to exercise appointing powers constitutionally vested in the Chief Executive. Buckley v Valeo, 424 US, at 109–143, 46 L Ed 2d 659, 96 S Ct 612.

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The Constitution does not speak of Presidential papers, just as it does not speak of workpapers of Members of Congress or of judges.[9] But there can be no room for doubt that, up to now, it has been the implied prerogative of the President—as of Members of Congress and of judges—to memorialize matters, establish filing systems, and to provide unilaterally for disposition of his workpapers. Control of Presidential pa-

own behalf only; it defended the appointment procedures, but it was not joined by the Attorney General and did not express the view of the President or of any other portion of the Executive Branch.

9. As to congressional papers, see supra, at 510–511, 53 L Ed 2d 933. Despite the Constitution's silence as to the *papers* of the Legislative Branch, this Court had no difficulty holding those papers to be protected from control by other branches. See also Mr. Justice Brennan's dissenting opinion in United States v Brewster, 408 US 501, 532–533, 33 L Ed 2d 507, 92 S Ct 2531 (1972), where he quotes approvingly from Kilbourn v Thompson, 103 US 168, 26 L Ed 377 (1881), and Coffin v Coffin, 4 Mass 1 (1808). In both of those cases, *written* materials by legislators were deemed to be protected by legislative immunity from intrusion or seizure.

pers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.[10]

To be sure, we recognized a narrowly limited exception to Presidential control of Presidential papers in United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974). But that case permits compulsory judicial intrusions only when a vital constitutional function, i. e., the conduct of criminal proceedings, would be impaired *and* when the President makes no more "than a generalized claim of . . . public interest . . . ," id., at 707, 41 L Ed 2d 1039, 94 S Ct 3090, in maintaining complete control of papers and in preserving confidentiality. That case, in short, was essentially a conflict between the Judicial Branch and the President, where the effective functioning of both branches demanded an accommodation and where the prosecutorial and judicial demands upon the President were very narrowly restricted with great

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specificity "to a limited number of conversations. . . ." Moreover, the request for production there was limited to materials that might themselves contain evidence of criminal activity of persons then under investigation or indictment. Finally, the intrusion was carefully limited to an in camera examination, under strict limits, by a single United States District Judge. That case does not stand for the proposition that the Judiciary is at liberty to order *all* papers of a President into custody of United States Marshals.[11]

United States v Nixon, therefore, provides no authority for Congress' mandatory regulation of Presidential papers simply "to promote the general Welfare" which, of course, is a generalized purpose. No showing has been made, nor could it, that Congress' functions will be impaired by the former President's being allowed to control his own Presidential papers.[12] Without any threat whatever to its own functions, Congress has by this statute, as in Buckley v Valeo, exercised authority entrusted to the Executive Branch.[13]

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10. This discretion was exercised, as we have seen, by President Washington in the face of a congressional demand for production of his work-papers.

Obviously, *official documents* fall into an entirely different category and are not involved in this case.

11. Appellees, of course, would view that sort of intrusion as an intrabranch confrontation, since United States Marshals are officials of the Executive Branch, at least so long as the District Judge simply ordered the Marshals to take custody of and to review the documents without turning them over to the court. This is, of course, sheer sophistry.

12. Of course, United States v Nixon pertained only to the setting of Judicial-Executive conflict. Nothing in our holding suggests that, even if Congress needed Presidential documents in connection with its legislative functions, the constitutional tradition of Presidential control over Presidential documents in the face of legislative demands could be abrogated. We expressly stated in Nixon that "[w]e are not here concerned with the balance between . . . the confidentiality interest and congressional demands for9 information . . . ." 418 US, at 712 n 19, 41 L Ed 2d 1039, 94 S Ct 3090.

13. In his concurring opinion, Mr. Justice Powell concludes that Title I was addressed essentially to an "emergency" situation in the wake of appellant's resignation. But his opinion does not present any analysis as to whether this particular legislation, not *some* other legislation, is necessary to achieve that end. Since Title I commands confiscation of all materials of an entire Presidential administration, Title I was simply not crafted to meet the specific emergency it purports to address. Besides omitting any discussion justifying the need for Title I, Mr. Justice Powell's opinion relies entirely on the possibly limiting regulations to be promulgated at some future point by the GSA Administrator, which will

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D

Finally, in my view, the Act violates principles of separation of powers by intruding into the confidentiality of Presidential communications protected by the constitutionally based doctrine of Presidential privilege. A unanimous Court in United States v Nixon could not have been clearer in holding that the privilege guaranteeing confidentiality of such communications derives from the Constitution, subject to compelled disclosure only in narrowly limited circumstances:

> "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 US, at 708, 41 L Ed 2d 1039, 94 S Ct 3090.

President Lyndon Johnson expressed the historic view of Presidential confidentiality in even stronger terms in a letter to the GSA Administrator: "[S]ince the President . . . is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and

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classes of papers for varying periods of time. Therefore . . . I hereby reserve the right to restrict the use and availability of any materials . . . for such time as I, in my sole discretion, may . . . specify . . . ." Hearing before a Subcommittee of the House Committee on Government Operations on HJ Res 632, 89th Cong, 1st Sess, 17 (1965).

As a constitutionally based prerogative, Presidential privilege inures to the President himself; it is personal in the same sense as the privilege against compelled self-incrimination. Presidential privilege would therefore be largely illusory unless it could be interposed by the President against the countless thousands of persons in the Executive Branch, and most certainly if the Executive officials are acting, as this statute contemplates, at the command of a different branch of Government.[14]

This statute requires that persons not designated or approved by the former President will review all Presidential papers. Even if the Government agents, in culling through the materials, follow the "advisory" suggestions offered by the District Court, the fact remains that their

protect "all constitutional and legal rights . . . ." Ante, at 497, 53 L Ed 2d 924. This conclusion, of course, begs the precise question before us, which is whether the act of congressionally mandated seizure of all Presidential materials of one President violates the Constitution.

14. Civil service statutes aside, we know now that an Executive official cannot replace all of his underlings on the basis of a patronage system. Thus, as a matter of constitutional law, a Chief Executive would not be at liberty to replace all Executive Branch officials with persons who, for political reasons, enjoy the President's trust and confidence. Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976).

function abrogates the Presidential privilege. Congress has, in essence, commanded them to review and catalog thousands of papers and recordings that are undoubtedly privileged. Given that fact, it is clear that the Presidential privilege of one occupant of that office will have been rendered a nullity.[15]

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E

There remains another inquiry under the issue of separation of powers. Does the fact that the Act applies only to a former President, described as "a legitimate class of one," ante, at 472, 53 L Ed 2d 909, after he has left office, justify what would otherwise be unconstitutional if applicable to an incumbent President?

On the face of it, congressional regulation of the papers of a former President obviously will have less disruptive impact on the operations of an incumbent President than an effort at regulation or control over the same papers of an incumbent President. But this "remoteness" does not eliminate the separation-of-powers defects. First, the principle that a President must be free from coercion should apply to a former President, so long as Congress is inquiring or acting with respect to operations of the Government while the former President was in office.[16]

To the extent Congress is empowered to coerce a *former* President, every future President is at risk of denial of a large measure of the autonomy and independence contemplated by the Constitution and of the confidentiality attending it. Myers v United States, 272 US 52, 71 L Ed 160, 47 S Ct 21 (1926). Indeed, the President, if he is to have autonomy while in office, needs the assurance that Congress will not immediately be free to coerce him to open all his files and records and give an account of Presidential actions at the instant his successor is sworn in.[17] Absent the validity of the expectation of

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privacy of such papers (save for a subpoena under United States v Nixon), future Presidents and those they consult will be well advised to take into account the possibility that their most confidential correspondence, workpapers, and diaries may well be open to congressionally mandated review, with no time limit, should some political issue give rise to an interbranch conflict.

The Need for Confidentiality

The consequences of this development on what a President expresses to others in writing and orally are incalculable; perhaps even more crucial is the inhibiting impact on those to whom the President turns for

15. I cannot accept the argument pressed by appellees that review is rendered harmless by the fact that many of the documents *may* not be protected by Presidential privilege. How "harmless" review justifies manifestly "harmful" review escapes me.

16. President Truman, for one, objected to Congress' efforts to coerce him after he was no longer in office in connection with matters pertaining to his administration. See infra, at 522, 53 L Ed 2d 940.

17. It would be the height of impertinence, after all, to serve a legislative subpoena on an outgoing President as he is departing from the inauguration of his successor. So too, the people would rightly be offended, and more important, so would the Constitution, by a congressional resolution, designed to ensure the smooth functioning of the Executive Branch, requiring a former President, upon leaving office, to remain in Washington, D. C., in order to be available for consultations with his successor for a prescribed period of time.

information and for counsel, whether they are officials in the Government, business or labor leaders, or foreign diplomats and statesmen. I have little doubt that Title I —and the Court's opinion—will be the subject of careful scrutiny and analysis in the foreign offices of other countries whose representatives speak to a President on matters they prefer not to put in writing, but which may be memorialized by a President or an aide. Similarly, Title I may well be a "ghost" at future White House conferences, with conferees choosing their words more cautiously because of the enlarged prospect of compelled disclosure to others. A unanimous Court carefully took this into account in United States v Nixon:

> "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making." 418 US, at 708, 41 L Ed 2d 1039, 94 S Ct 3090.

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In this same vein, Mr. Justice Powell argues that President Carter's representation to the Court through the Solicitor General that Title I enhances the efficiency of the Executive Branch is dispositive of appellant's separation-of-powers claim. This deference to the views of one administration, expressed approximately 100 days after its inception, as to the permanent structure of our Government is not supported by precedent and conflicts with 188 years of history. First, there is no principled basis for limiting this unique deference. If and when the one-House veto issue, for example, comes before us, are we to accept the opinion of the Department of Justice as to the effects of that legislative device on the Executive Branch's operations? Second, if Title I is thus efficacious, why did the President who signed this bill into law decide to establish a Presidential library in Ann Arbor, Mich., rather than turn all of his Presidential materials over to GSA for screening and retention in Washington, D. C., where the materials would be readily accessible to officials of the Executive Branch? And why, suddenly, is Congress' acquiescence in President Ford's actions consistent with the supposed foundation of Title I?

Third, as pointed out by Mr. Justice Blackmun, ante, at 491, 53 L Ed 2d 921: "Political realities often guide a President to a decision not to veto" or, indeed, a decision not to challenge in court the actions of Congress. See n 18, infra. Finally, it is perhaps not inappropriate to note that, on occasion, Presidents disagree with their predecessors on issues of policy. Some have believed in "Congressional Government"; others adhered to expansive notions of Presidential power. It is, I respectfully submit, a unique idea that this Court accept as controlling the representations of any administration on a constitutional question going to the permanent structure of Government.

Title I is also objectionable on separation-of-powers grounds, despite its applicability only to a former President, because compelling the disposition of all of a former Presi-

dent's papers

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is a legislative exercise of what have historically been regarded as executive powers. Presidential papers do not, after all, instantly lose their nature quadrennially at high noon on January 20. Moreover, under Title I it is now the Congress, not the incumbent President,[18] that has decided what to do with *all* the papers of one entire administration.

Finally, the federal appellees concede that Presidential privilege, a vital incident of our separation-of-powers system, does not terminate instantly upon a President's departure from office. They candidly acknowledge that "the privilege survives the individual President's tenure," Brief for Federal Appellees 33, because of the vital public interests underlying the privilege. This principle, as all parties concede, finds explicit support in history; former President Truman in 1953 refused to provide information to the Congress on matters occurring during his administration, advising Congress:

> "It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, *it must be equally applicable to a President after his term of office has expired* when he is sought to be examined with respect to any acts occurring while he [was] President." 120 Cong Rec 33419 (1974). (Emphasis supplied.)[19]

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To ensure institutional integrity and confidentiality, Presidents and their advisers must have assurance, as do judges and Members of Congress, that their internal communications will not become subject to retroactive legislation mandating intrusions into matters as to which there was a well-founded expectation of privacy when the communications took place. Just as Mr. Truman rejected congressional efforts to inquire of him, after he left office, as to his activities while President, this Court has always assumed that the immunity conferred by the Speech or Debate Clause is available to a Member of Congress after he leaves office. United States v Brewster, 408 US 501, 33 L Ed 2d 507, 92 S Ct 2531 (1972). It would therefore be illogical to conclude that the President loses all immunity from legislative coercion as to his Presidential papers from the moment he leaves office.

The Court correctly concedes that a former President retains the Presidential privilege after leaving office, ante, at 448–449, 53 L Ed 2d 894–895; but it then concludes that several considerations cut against recognition of the privilege as to one former President. First, the Court places

18. The fact that the President signs a bill into law, and thereafter defends it, without more, does not mean, of course, that the policy embodied in the legislation is that of the President, nor does it even mean that the President personally approves of the measure. When signing a bill into law, numerous Presidents have actually expressed disagreement with the legislation but felt constrained for a variety of reasons to permit the bill to become law. President Franklin D. Roosevelt repudiated the "Lovett Rider" later struck down by this Court in United States v Lovett, 328 US 303, 325, 90 L Ed 1252, 66 S Ct 1073 (1946) (Frankfurter, J., concurring). President Ford did not request this legislation in order to assure the effective functioning of the Executive Branch.

19. Since by definition the concern is with former Presidents, I see no distinction in Congress' seeking to compel the appearance and testimony of a former President and in, alternatively, seeking to compel the production of Presidential papers over the former President's objection.

great emphasis on the fact that neither President Ford nor President Carter "supports appellant's claim . . . ." Ante, at 449, 53 L Ed 2d 895. The relevance of that fact is not immediately clear. The validity of one person's constitutional privilege does not depend on whether some other holder of the same privilege supports his claim.[20] The fact that an *incumbent* President has signed or supports a particular measure cannot defeat a *former* President's claim of privilege. If the Court is correct today, it was wrong one year ago in Buckley v Valeo, when we unanimously held that Presidential approval of the Federal Election Campaign

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Act could not validate an unconstitutional invasion of Presidential appointing authority.

Second, the Court suggests that many of the papers are unprivileged. Of the great volume of pages, appellant estimated that he saw only about 200,000 items while he was President. Several points are relevant in this regard. We do not know how many pages the 200,000 items represent; the critical factor is that all papers are presumptively privileged. Regardless of the number of pages, the fact remains that the 200,000 items that the President personally reviewed or prepared while in office obviously have greater historical value than the mass of routine papers coming to the White House. Mountains of Government reports tucked away in Presidential files will not likely engage the interest of archivists or historians, since most such reports are not historically important and are, in any event, available elsewhere. Rather, archivists and historians will want to find and preserve the materials that reflect the President's internal decisionmaking processes. Those are precisely the papers which will be subjected to the most intensive review and which have always been afforded absolute protection. The Court's analytically void invocation of sheer numbers cannot mask the fact that the targets of the review are privileged papers, diaries, and conversations.

I agree that, under United States v Nixon, the Presidential privilege is qualified. From that premise, however, the Court leaps to the conclusion that future regulations governing *public access* to the materials are sufficient to protect that qualified privilege. The Act does indeed provide for a number of safeguards before the public at large obtains access to the materials. See § 104(a). But the Court cannot have it both ways. The opinion expressly recognizes again and again that *public access is not now the issue.* The constitutionality of a statute cannot rest on the presumed validity of regulations not yet issued; moreover, no regulations governing public access can remedy the statute's basic flaw of

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permitting Congress to seize the confidential papers of a President.

F

In concluding that Title I on its face violates the principle of separation of powers, I do not address the issue whether some circumstances might justify legislation for the disposition of Presidential papers with-

20. Clients asserting the attorney-client privilege have not, up to now, been foreclosed from interposing the privilege unless a similarly situated client is willing to support the particular claim.

out the President's consent. Here, nothing remotely like the *particularized need* we found in United States v Nixon has been shown with respect to these Presidential papers. No one has suggested that Congress will find its own "core" functioning impaired by lack of the impounded papers, as we expressly found the judicial function would be impaired by lack of the material subpoenaed in United States v Nixon.

I leave to another day the question whether, under exigent circumstances, a *narrowly defined* congressional demand for Presidential materials might be justified. But Title I fails to satisfy either the required narrowness demanded by United States v Nixon or the requirement that the coequal powers of the Presidency not be injured by congressional legislation.

II

Privacy

The discussion of separation of powers concerns, of course, the structure of government, not the rights of the sole individual ostensibly affected by this legislation. But Title I touches not only upon the independence of a coordinate branch of government, it also affects, in the most direct way, the basic rights of one named individual. The statute provides, as we have seen, for governmental custody over—and review of—all of the former President's written and recorded materials at the time he left office, including diary recordings and conversations in his private residences outside Washington, D. C. § 101 (a)(2).

The District Court was deeply troubled by this admittedly

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unprecedented intrusion. Its opinion candidly acknowledged that the personal-privacy claim was the "most troublesome" point raised by this unique statute.[21] In addition to communications and memoranda reflecting the President's confidential deliberations, the District Court admitted that the materials subject to GSA review included highly personal communications.

> "Among all of the papers and tape recordings falling within the Act, however, are some papers and materials containing extremely private communications between [Mr. Nixon] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. . . . Segregating those that are private from those that are not private requires rather comprehensive screening, and archivists entrusted with that duty will be required to read or listen to private communications." 408 F Supp 321, 359 (DC 1976).

A

Given this admitted intrusion, the legislation before us must be subjected to the most searching kind of

21. The District Court concluded its discussion of the privacy challenge as follows: "We would be less than candid were we to state that we find it as easy to dispose of Mr. Nixon's privacy claims as his claim of presidential privilege." 408 F Supp, at 367.

judicial scrutiny.[22] Statutes that trench on fundamental liberties, like
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those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. Moore v East Cleveland, 431 US 494, 499, 52 L Ed 2d 531, 97 S Ct 1932 (1977). The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are affected, to justify the measure. Abood v Detroit Board of Education, 431 US 209, 263–264, 52 L Ed 2d 261, 97 S Ct 1782 (1977) (Powell, J., concurring in judgment). We recently reaffirmed the standard or review in such cases as one of "exacting scrutiny."

> "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . [W]e have required that the subordinating interests of the State must survive exacting scrutiny." Buckley v Valeo, 424 US, at 64, 46 L Ed 2d 659, 96 S Ct 612.

B

Constitutional analysis must, of course, take fully into account the nature of the Government's interests underlying challenged legislation. Once those interests are identified, we must then focus on the nature of the individual interests affected by the statute. Id., at 14–15, 46 L Ed 2d 659, 96 S Ct 612. Finally, we must decide whether the Government's interests are of sufficient weight to subordinate the individual's interests, and, if so, whether the Government has nonetheless employed unnecessarily broad means for achieving its purposes. Lamont v Postmaster General, 381 US 301, 310, 14 L Ed 2d 398, 85 S Ct 1493 (1965) (Brennan, J., concurring).

Two governmental interests are asserted as the justification for this statute: to ensure the general efficiency of the Executive
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Branch's operations[23] and to preserve histori-

22. Although the District Court expressly concluded that the former President had a "legitimate expectation" that his Presidential materials would not be subject to "comprehensive review by government personnel without his consent," 408 F Supp, at 361, the Court nonetheless deemed the compulsory intrusion permissible given the constitutionality of the federal wiretap statute, 18 USC §§ 2510–2520 [18 USCS §§ 2510–2520], which of course permits substantial governmental intrusions into the privacy of individuals. Not only is this analogy imperfect, as the District Court itself admitted, 408 F Supp, at 364, but this analysis fails to apply the "exacting scrutiny" called for by our decisions. Above all, the present statute fails to provide *any* of the stringent safeguards, including a warrant, mandated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Indeed, the District Court flatly admitted as much. Ibid.

23. Administrative efficiency is obviously a highly desirable goal. See, e. g., Dixon v Love, 431 US 105, 114, 52 L Ed 2d 172, 97 S Ct 1723 (1977); Mathews v Eldridge, 424 US 319, 347–349, 47 L Ed 2d 18, 96 S Ct 983 (1976). However, I am constrained to recall that "administrative efficiency" has not uniformly been regarded as of "overriding importance." Indeed, claims of administrative efficiency have been swiftly dismissed at times as mere "bald assertion[s]." Richardson v Wright, 405 US 208, 223, 31 L Ed 2d 151, 92 S Ct 788 (1972) (Brennan, J., dissenting). Numerous other opinions have held that individual interests, including the right to welfare payments, "clearly outweigh" government interests in promoting "administrative efficiency," Goldberg v Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970) (opinion of Brennan, J.). And, Mr. Justice Marshall in Shapiro v Thompson, 394 US 618, 634, 22 L Ed 2d 600, 89 S Ct 1322 (1969), stated that when "funda-

cally significant papers and tape recordings for posterity.[24] Both these purposes are legitimate and important. Yet, there was no serious suggestion by Congress that the operations of the Executive Branch would actually be impaired unless, contrary to nearly 200 years' past practice, all Presidential papers of the one named incumbent were required by law to be impounded in the sole control of Government agents. The statute on its face, moreover, does not purport to address a particularized need, such as the need to secure Presidential papers concerning the Middle East, the SALT talks, or problems in Panama.[25] Indeed, the congressionally perceived "need" is a

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far more "generalized need" than that rejected in United States v Nixon by a unanimous Court.

As to the interest in preserving historical materials, there is nothing whatever in our national experience to suggest that existing mechanisms, such as the 20-year-old Presidential Libraries Act, were insufficient to achieve that purpose.[26] In any event, the interest in preserving "historical materials" cannot justify seizing, without notice or hearing, private papers preliminary to a line-by-line examination by Government agents.

In contrast to Congress' purposes underlying the statute, this Act intrudes significantly on two areas of traditional privacy interests of Presidents. One embraces Presidential papers relating to his decisions, development of policies, appointments, and communications in his role as leader of a political party; the other encompasses purely private matters of family, property, investments, diaries, and intimate conversations. Both interests are of the highest order, with perhaps some primacy for family papers.[27] Cf. Moore v East Cleveland, supra, at 499, 52 L Ed 2d 531, 97 S Ct 1932.

Title I thus touches directly on what Mr. Justice Powell once referred to as the "intimate areas of an individual's personal affairs," California Bankers Assn. v Shultz, 416 US

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21, 78, 39 L Ed 2d 812, 94 S Ct

mental" rights are at stake, such as the "right to travel," government must demonstrate a *"compelling"* interest, not merely a "rational relationship between [the underlying statute] and [the] . . . admittedly permissible state objectives . . . ."

24. The initial interest in preserving the materials for judicial purposes has diminished substantially. Since the Special Prosecutor has disclaimed any further interest in the materials for purposes of possible criminal investigations, the only conceivably remaining judicial need is to preserve the materials for possible use in civil litigation between *private parties*. The admittedly important interests in the enforcement of the criminal law, recognized in United States v Nixon, are no longer pressed by the Government.

25. If there were a particularized need, the statute suffers from greater overbreadth than others we have invalidated.

26. At the time the statute was passed, appellant had made tentative arrangements with the University of Southern California in Los Angeles for the establishment of a Presidential library, under the terms of the Presidential Libraries Act. App at 167–168. That has now ripened into a formal agreement so that in the event Title I is invalidated, appellant's historical materials will be housed in a facility on the USC campus under terms applicable to other Presidential libraries of past Presidents.

27. The Court's refusal to afford constitutional protection to such commercial matters as bank records, California Bankers Assn. v Shultz, 416 US 21, 39 L Ed 2d 812, 94 S Ct 1494 (1974), or drug prescription records, Whalen v Roe, 429 US 589, 51 L Ed 2d 64, 97 S Ct 869 (1977) only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.

1494 (1974) (concurring opinion). The papers in both of these areas—family and political decisionmaking—are of the most private nature, enjoying the highest status under our law. Mr. Justice Brennan recently put it this way: "Personal letters constitute an integral aspect of a person's private enclave." Fisher v United States, 425 US 391, 427, 48 L Ed 2d 39, 96 S Ct 1569 (1976) (concurring in judgment). An individual's papers, he said, are "an extension of his person." Id., at 420, 48 L Ed 2d 39, 96 S Ct 1569. Mr. Justice Marshall made the same point: "Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy." Couch v United States, 409 US 322, 350, 34 L Ed 2d 548, 93 S Ct 611 (1973) (dissenting opinion). In discussing private papers, he referred even more emphatically to the "deeply held belief on the part of the Members of this Court throughout its history that there are certain documents *no person ought to be compelled to produce at the Government's request.*" Fisher v United States, supra, at 431–432, 48 L Ed 2d 39, 96 S Ct 1569 (emphasis supplied) (concurring in judgment). This echoes Lord Camden's oft-quoted description of personal papers as a man's "dearest property." Boyd v United States, 116 US 616, 628, 29 L Ed 746, 6 S Ct 524 (1886).

One point emerges clearly: The papers here involve the most fundamental First and Fourth Amendment interests. Since the Act asserts *exclusive* Government custody over *all* papers of a former President, the Fourth Amendment's prohibition against unreasonable searches and seizures is surely implicated.[28] Indeed, where papers or books are the subject

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of a government intrusion, our cases uniformly hold that the Fourth Amendment prohibition against a general search requires that warrants contain descriptions reflecting "the most scrupulous exactitude . . . ," Stanford v Texas, 379 US 476, 485, 13 L Ed 2d 431, 85 S Ct 506 (1965). Those cases proscribe general language in a warrant—or a statute—of "indiscriminate sweep . . . ." Id., at 486, 13 L Ed 2d 431, 85 S Ct 506. Title I, commanding seizure followed by permanent control of all materials having "historical or commemorative value," evidences the "indiscriminate sweep" we have long denounced. This "broad broom" statute provides virtually no standard at all to guide the Government agents combing through the papers; the agents are left to roam at large through confidential materials, something to which no other President and no Member of Congress or of the Judicial Branch has been subjected.

The Court, while recognizing that Government agents will necessarily be reviewing the most private kinds of communications covering a period of five and one-half years, tells us that Stanford is inapposite. Several reasons are given. The Court suggests that, unlike the instant case, the seizure in Stanford included vast

28. The fact that GSA initially secured possession of the Presidential papers through the agreement with the former President does not change the fact that the agency was commanded by Congress to take exclusive custody of *and retain* all Presidential historical materials. Moreover, everyone admits that the Act contemplates a careful screening process by Government agents. The fact that the governmental intrusion is noncriminal in nature does not, of course, render the Fourth Amendment's prohibitions inapplicable. See South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092 (1976).

quantities of materials unrelated to any legitimate government objective; in addition, the Stanford intrusion constituted an invasion of the home in connection with a criminal investigation. That last consideration relied on by the Court can be disposed of quickly, for by its terms, just as in Stanford, Title I commands seizure and review of papers from appellant's *private residences* within and outside Washington, D. C., § 101(a), for the purpose, among others, of criminal proceedings brought by the Special Prosecutor, § 102(b), and to make the materials available more broadly "for use in judicial proceedings." § 104(a)(2). Title I is not needed for this purpose, since a narrowly defined subpoena can accomplish those purposes under United States v Nixon. Title I is in effect a "legislative warrant" reminiscent of the odious general warrants of the colonial era.

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As to the Court's first consideration, its "quantity" test is fallacious. The intrusion in Stanford was unlawful not because the State had an interest in only part of many items in Stanford's home, but rather because the warrant failed to describe the objects of seizure with the "most scrupulous exactitude." Stanford is not a "numbers" test, the protection of which vanishes if unprotected materials outnumber protected materials; it is, rather, a test designed to ensure *that protected materials are not seized at all.* Title I on its face commands that protected materials be seized wherever found—including the private residences mentioned—reviewed, and returned only if the Government agents decide that certain protected materials lack historical significance. The Act plainly accomplishes exactly what Stanford expressly forbids.

In addition to Fourth Amendment considerations, highly important First Amendment interests pervade all Presidential papers, since they include expressions of privately held views about politics, diplomacy, or people of all walks of life, within and outside this country. Appellant's freedom of association is also implicated, since his recordings and papers will likely reveal much about his relationships with both individuals and organizations. In NAACP v Alabama, 357 US 449, 462, 2 L Ed 2d 1488, 78 S Ct 1163 (1958), the Court said:

> "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."

Accordingly, in passing on a statute compelling disclosure of political contributions, the Court, in Buckley v Valeo, imposed the strict standard of "exacting scrutiny" because of the significant impact on First Amendment rights.

The fact that the former President was an important national and world political figure obviously does not diminish the traditional privacy interest in his papers. Forced disclosure of private information, even to Government officials, is by no means sanctioned by this Court's decisions, except for

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the most compelling reasons. Cf. Whalen v Roe, 429 US 589, 51 L Ed 2d 64, 97 S Ct 869 (1977). I do not think, for example, that this Court would readily sustain, as a condition to holding public office, a requirement that a candidate reveal publicly membership in every organization whether reli-

gious, social, or political. After all, our decision in NAACP v Alabama, supra, was presumably intended to protect from compelled disclosure members of the organization who were actively involved in public affairs or who held public office in Alabama.

The Court's reliance on Whalen v Roe, supra, in rejecting appellant's privacy claim is surprising. That case dealt with the State's undoubted police power to regulate dispensing of dangerous drugs, the very use or possession of which the State could forbid. Whalen, supra, at 603, and 597 n 20, 51 L Ed 2d 64, 97 S Ct 869. Hence, we had no difficulty whatever in reaching a unanimous holding that the public interest in regulating *dangerous drugs* outweighed any privacy interest in reporting to the State all prescriptions, those reports being made confidential by statute. No personal, private business, or political confidences were involved.

C

In short, a former President up to now has had essentially the same expectation of privacy with respect to his papers and records as every other person. This expectation is soundly based on two factors: First, under our constitutional traditions, Presidential papers have been, for more than 180 years, deemed by the Congress to belong to the President. Congress ratified this tradition by specific Acts: (a) congressional appropriations following authorization to purchase Presidential papers; (b) congressional enactment of a nonmandatory system of Presidential libraries; and (c) statutes permitting, until 1969, a charitable-contribution deduction for papers of Presidents donated to the United States or to nonprofit institutions.

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Second, in the absence of any legislation to the contrary, there was no reason whatever for a President to take time from his official duties to ensure that there was no "commingling" of "public" and "private" papers. Indeed, the fact that the former President commingled Presidential and private family papers, absent any then-existing laws to the contrary, points strongly to the conclusion that he did in fact have an expectation of privacy with respect to both categories of papers.

On the basis of this Court's holdings, I cannot understand why the former President's privacy interests do not outweigh the generalized, undifferentiated goals sought to be achieved by Title I. Without a more carefully defined focus, these legislative goals do not represent "paramount Government interests," nor is this particular piece of legislation needed to achieve those goals, even if we assume, arguendo, that they are of a "compelling" or "overriding" nature. But even if other Members of the Court strike the balance differently, the Government has nonetheless failed to choose narrowly tailored means of carrying out its purposes so as not unnecessarily to invade important First and Fourth Amendment liberties. The Court demanded no less in Buckley v Valeo, and nothing less will do here. Cf. Hynes v Mayor of Oradell, 425 US 610, 620, 48 L Ed 2d 243, 96 S Ct 1755 (1976).

The federal appellees point to two factors as mitigating the effects of this admitted intrusion: first, in their view, most of the President's

papers and conversations relate to the business of Government, rather than to personal, family or political matters; second, it is said that the intrusion is limited as much as possible, since the review will be carried out by specially trained Government agents.

Even accepting the Government's interest in identifying and preserving governmentally related papers in order to preserve them for historical purposes, that interest cannot justify a seizure and search of *all* the papers taken here.

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Since compulsory review of personal and family papers and tape recordings is an admittedly improper invasion of privacy, no constitutional principle justifies an intrusion into indisputably protected areas in order to carry out the "generalized" statutory objectives.

Second, the intrusion cannot be saved by the credentials, however impeccable, of the Government agents. The initial problem with this justification is that no one knows whether these agents are, as the federal appellees contend, uniformly discreet. Despite the lip service paid by the District Court and appellees to the record of archivists generally, there is nothing before us to justify the conclusion that each of the more than 100 persons who apparently will have access to, and will monitor and examine, the materials is indeed reliably discreet.

The Act, furthermore, provides GSA with no meaningful standards to minimize the extent of intrusions upon appellant's privacy. We are thus faced with precisely the same standardless discretion vested in governmental officials which this Court has unhesitatingly struck down in other First Amendment areas. See, e.g., Hynes v Mayor of Oradell, supra. In the absence of any meaningful statutory standards, which might help secure the privacy interests at stake, I question whether we can assume, as a matter of law, that Government agents will be able to formulate for themselves constitutionally valid standards of review in examining, segregating, and cataloging the papers of the former President.

Nor does the possibility that, had Title I not been passed, appellant would perhaps use Government specialists to help classify and catalog his papers eliminate the objections to this intrusion. Had appellant, like all his recent predecessors, been permitted to deposit his papers in a Presidential library, Government archivists would have been working directly under appellant's guidance and direction, not solely that of Congress or GSA. He, not Congress, would have established standards

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for preservation, to ensure that his privacy would be protected. Similarly, he would have been able to participate personally in the reviewing process and could thus assure that any governmental review of purely personal papers was minimized or entirely eliminated. He, not Congress, would have controlled the selection of which experts, if any, would have access to his papers. Finally, and most important, the "intrusion" would have been consented to, eliminating any constitutional question. But the *possibility* of a consent intrusion cannot, under our law, justify a nonconsensual invasion. Actual consent is required, cf. Schneckloth v Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), not the mere possibility of consent under drastically different circumstances.

Finally, even if the Government agents are completely discreet, they are still Government officials charged with reviewing highly private papers and tape recordings. Unless we are to say that a police seizure and examination of private papers is justified by the "impeccable" record of a discreet police officer, I have considerable difficulty understanding how a compulsory review of admittedly private papers, in which there is no conceivable governmental interest, by Government agents is constitutionally permissible.

III

Bill of Attainder

A

Under Art I, § 9, cl 3, as construed and applied by this Court since the time of Mr. Chief Justice Marshall, Title I violates the Bill of Attainder Clause. In contrast to Title II of Pub L 93-526, the Public Documents Act, which establishes a National Study Commission to study questions concerning the preservation of records of *all* federal officials, Title I commands the Administrator to seize all tape recordings "involv[ing] former President Richard M. Nixon" and all "Presidential historical materials of Richard M. Nixon . . . ."

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§§ 101(a)(1), (b)(1). By contrast with Title II, which is general legislation, Title I is special legislation singling out one individual as the target.

Although the prohibition against bills of attainder has been addressed only infrequently by this Court, it is now settled beyond dispute that a bill of attainder, within the meaning of Art I, is by no means the same as a bill of attainder at common law. The definition departed from the common-law concept very early in our history, in a most fundamental way. At common law, the bill was a death sentence imposed by legislative Act. Anything less than death was not a bill of attainder, but was, rather, "a bill of pains and penalties." This restrictive definition was recognized tangentially in Marbury v Madison, 1 Cranch 137, 179, 2 L Ed 60 (1803),[29] but the Court soon thereafter rejected conclusively any notion that only a legislative death sentence or even incarceration imposed on named individuals fell within the prohibition. Mr. Chief Justice Marshall firmly settled the matter in 1810, holding that legislative punishment in the form of a deprivation of property was prohibited by the Bill of Attainder Clause:

> "A bill of attainder may affect the life of an individual, *or may confiscate his property,* or may do both." Fletcher v Peck, 6 Cranch 87, 138, 3 L Ed 162. (Emphasis supplied.)

The same point was made 17 years later in Ogden v Saunders, 12 Wheat 213, 286, 6 L Ed 606, where the Court stated:

> "By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the
>
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>
> general intent becomes very apparent; *it is a general provision against arbitrary and tyrannical legislation over existing*

29. "The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

"If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?" Marbury v Madison, 1 Cranch, at 179, 2 L Ed 60.

rights, whether of person or property." (Emphasis supplied.)

More than 100 years ago this Court struck down statutes which had the effect of preventing defined categories of persons from practicing their professions. Cummings v Missouri, 4 Wall 277, 18 L Ed 356 (1867) (a priest); Ex parte Garland, 4 Wall 333, 18 L Ed 366 (1867) (a lawyer). Those two cases established more broadly that "punishment" for purposes of bills of attainder is not limited to criminal sanctions; rather, "[t]he deprivation of *any rights, civil,* or political, *previously enjoyed,* may be punishment . . . ." Cummings, 4 Wall, at 320, 18 L Ed 356.

Mr. Chief Justice Warren pointed out that the Constitution, in prohibiting bills of attainder, did not envision "a narrow, technical (and therefore soon to be outmoded) prohibition . . . ." United States v Brown, 381 US-437, 442, 14 L Ed 2d 484, 85 S Ct 1707 (1965). To the contrary, the evil was a *legislatively imposed* deprivation of existing rights, including property rights, directed at named individuals. Mr. Justice Black, in United States v Lovett, 328 US 303, 315–316, 90 L Ed 1252, 66 S Ct 1073 (1946), stated:

"[The cases] stand for the proposition that legislative acts, *no matter what their form,* that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (Emphasis supplied.)

The only "punishment" in Lovett, in fact, was the deprivation of Lovett's salary as a Government employee—an indirect punishment for his "bad" associations.

Under our cases, therefore, bills of attainder require two elements: First, a specific designation of persons or groups as subjects of the legislation, and, second, a Garland-Cummings-Lovett-Brown-type arbitrary deprivation, including deprivation

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of property rights, without notice, trial, or other hearing.[30] No one disputes that Title I suffers from the first infirmity, since it applies only to one former President. The issue that remains is whether there has been a legislatively mandated deprivation of an existing right.

B

Since George Washington's Presidency, our constitutional tradition, without a single exception, has treated Presidential papers as the President's personal property. This

30. Title I fails to provide any procedural due process safeguards, either before or after seizure of the Presidential materials. There is no provision whatever permitting appellant to be heard in the decisionmaking process by which GSA employees will determine, with no statutory standards to guide them, whether particular materials have "general historical value." No time restraints are placed upon GSA's decisionmaking process, even though this Court has consistently recognized that, when dealing with First Amendment interests, the timing of governmental decisionmaking is crucial. E.g., Freedman v Maryland, 380 US 51, 13 L Ed 2d 649, 85 S Ct 734 (1965); Marcus v Search Warrant, 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708 (1961). Under those holdings, any statute which separates an individual, against his will, from First Amendment protected materials must be strictly limited within a time frame. Title I, in contrast, places no limits with respect to GSA's retention of custody over appellant's papers; three years have already elapsed since seizure of the papers in question.

view has been congressionally and judicially ratified, both as to the ownership of Presidential papers, Folsom v Marsh, 9 F Cas 342 (No. 4,901) (CC Mass 1841) (Story, J., sitting as Circuit Justice), and, by the practice of Justices as to ownership of their judicial papers.

Congress itself has consistently legislated on this assumption. I have noted earlier that appropriation legislation has been enacted on various occasions providing for Congress' *purchase* of Presidential papers. See Hearing before a Special Subcommittee of the House Committee on Government Operations on HJ Res 330, 84th Cong, 1st Sess, 28 (1955). Those hearings led Congress to establish a *nonmandatory* system

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of Presidential libraries, again explicitly recognizing that Presidential papers were the personal property of the Chief Executive. In the floor debate on that measure, Congressman John Moss, a supporter of the legislation, stated: "Finally, it should be remembered that Presidential papers belong to the President . . . ." 101 Cong Rec 9935 (1955). Indeed, in 1955 in testimony pertaining to this proposed legislation, the Archivist of the United States confirmed:

> "The papers of the Presidents have always been considered to be their personal property, both during their incumbency and afterward. This has the sanction of law and custom and has never been authoritatively challenged." Hearing on HJ Res 330, supra, at 32.

Similarly, the GSA Administrator testified:

> "As a matter of ordinary practice, the President has removed his papers from the White House at the end of his term. This has been in keeping with the tradition *and the fact that the papers are the personal property of the retiring Presidents.*" Id., at 14. (Emphasis supplied.)

In keeping with this background, it was not surprising that the Attorney General stated in an opinion in September 1974:

> "To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times." 43 Op Atty Gen No. 1, pp 1–2 (Sept. 6, 1974).

I see no escape, therefore, from the conclusion that, on the basis of more than 180 years' history, the appellant has been deprived of a property right enjoyed by all other Presidents

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after leaving office, namely, the control of his Presidential papers.

Even more starkly, Title I deprives only one former President of the right *vested by statute* in other former Presidents by the 1955 Act—the right to have a Presidential library at a facility of his own choosing for the deposit of such Presidential papers as he unilaterally selects. Title I did not purport to repeal the Presidential Libraries Act; that statute remains in effect, available to present and future Presidents, and has already been availed of by former President Ford. The operative effect of Title I, therefore, is to exclude, by name, one former President and deprive him of what his predecessors—and his successor—have already been allowed. This in-

vokes what Mr. Justice Black said in Lovett, could not be constitutionally done:

> "Those who wrote our Constitution well knew the danger inherent in *special legislative acts* which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." 328 US, at 317, 90 L Ed 1252, 66 S Ct 1073. (Emphasis supplied.)

But apart from Presidential papers generally, Title I on its face contemplates that even the former President's purely family and personal papers and tape recordings are likewise to be taken into custody for whatever period of time is required for review. Some items, such as the originals of tape recordings of the former President's conversations, will never be returned to him under the Act.

I need not, and do not, inquire into the motives of Congress in imposing this deprivation on only one named person. Our cases plainly hold that retribution and vindictiveness are not requisite elements of a bill of attainder. The Court

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appears to overlook that Mr. Chief Justice Warren in United States v Brown, supra, concluded that retributive motives on the part of Congress were irrelevant to bill-of-attainder analysis. To the contrary, he said flatly: "It would be archaic to limit the definition of punishment to 'retribution.'" Indeed, he expressly noted that bills of attainder had historically been enacted for regulatory or preventive purposes:

> "Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event." 381 US, at 458–459, 14 L Ed 2d 484, 85 S Ct 1707.

Under the long line of our decisions, therefore, the Court has the heavy burden of demonstrating that legislation which singles out one named individual for deprivation—without any procedural safeguards—of what had for nearly 200 years been treated by all three branches of Government as private property, can survive the prohibition of the Bill of Attainder Clause. In deciding this case, the Court provides the basis for a future Congress to enact yet another Title I, directed at some future former President, or a Member of the House or the Senate because the individual has incurred public disfavor and that of the Congress. Cf. Powell v McCormack, 395 US 486, 23 L Ed 2d 491, 89 S Ct 1944 (1969). As in United States v Brown, Title I, in contrast to Title II, does "not set forth a generally applicable rule," 381 US, at 450, 14 L Ed 2d 484, 85 S Ct 1707; it is beyond doubt special legislation doing precisely the evil against which the prohibitions of the "bills of attainder,

ex post facto laws, and laws impairing the obligation of contracts . . ." were aimed. Ogden v Saunders, 12 Wheat, at 286, 6 L Ed 606.

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The concurring opinions make explicit what is implicit throughout the Court's opinion, i.e., (a) that Title I would be unconstitutional under separation-of-powers principles if it applied to any other President; (b) that the Court's holding rests on appellant's being a "legitimate class of one," ante, at 472, 53 L Ed 2d 909; and (c) that the Court's holding "will not be a precedent." Ante, at 486, 53 L Ed 2d 918.

Nothing in our cases supports the analysis of Mr. Justice Stevens, ibid. Under his view, appellant's resignation and subsequent acceptance of a pardon set him apart as a " 'legitimate class of one.' " The two events upon which he relies, however, are beside the point. Correct analysis under the Bill of Attainder Clause focuses solely upon the nature of the measure adopted by Congress, not upon the actions of the target of the legislation. Even if this approach were analytically sound, the two events singled out are relevant only to two possible theories: First, that appellant is culpably deserving of punishment by virtue of his resignation and pardon; or second, that appellant's actions were so unique as to justify legislation confiscating his Presidential materials but not those of any other President. The first point can be disposed of quickly, since the Bill of Attainder Clause was, of course, intended to prevent legislatively imposed deprivations of rights upon persons whom the Legislature thought to be culpably deserving of punishment.

The remaining question, then, is whether appellant's "uniqueness" permits individualized legislation of the sort passed here. It does not. The point is not that Congress is powerless to act as to exigencies arising during or in the immediate aftermath of a particular administration; rather, the point is that Congress cannot *punish* a particular individual on account of his "uniqueness." If Congress had declared forfeited appellant's retirement pay to which he otherwise would be entitled, instead of confiscating his Presidential materials, it would not avoid the bill-of-attainder prohibition to say that appellant was guilty of unprecedented actions

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setting him apart from his predecessors in office. In short, appellant's uniqueness does not justify serious deprivations of existing rights, including the statutory right abrogated by Title I to establish a Presidential library.

The novel arguments advanced in the several concurring opinions serve to emphasize how clearly Title I violates the Bill of Attainder Clause; Mr. Justice Stevens although finding no violation of the Clause, admirably states the case which, for me, demonstrates the unconstitutionality of Title I:

> "The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him

as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause." Ante, at 484, 53 L Ed 2d 917.

IV

The immediate consequences of the Court's holding may be discounted by some on the ground it is justified by the uniqueness of the circumstances—in short, that the end justifies the means—and that, after all, the Court's holding is really not to be regarded as precedent. Yet the reported decisions of this Court reflect other instances in which unique situations confronted the Judicial Branch—for example, the alleged treason of one of the Founding Fathers. United States v Burr, 25 F Cas 187 (No. 14,694) (CC Va 1807) Burr may or may not have been blameless; Father Cummings and Lawyer Garland, in common with hundreds of thousands of others, may have been technically guilty of "carrying on

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rebellion" against the United States. But this Court did not weigh the culpability of Cummings, Garland, or of Lovett or Brown in according to each of them the full measure of the protection guaranteed by the literal language of the Constitution. For nearly 200 years this Court has not viewed either a "class" or a "class of one" as "legitimate" under the Bill of Attainder Clause.

It may be, as three Justices intimate in their concurring opinions, that today's holding will be confined to this particular "class of one"; if so, it may not do great harm to our constitutional jurisprudence but neither will it enhance the Court's credit in terms of adherence to stare decisis. Only with future analysis, in perspective, and free from the "hydraulic pressure" Holmes spoke of, will we be able to render judgment on whether the Court has today enforced the Constitution or eroded it.

Mr. Justice **Rehnquist,** dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors. Believing as I do that the Act is a clear violation of the constitutional principle of separation of powers, I need not address the other issues considered by the Court.[1]

1. While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that the Court addresses separately, it seems to me that the Court is too facile in separating appellant's "privacy" claims from his "separation of powers" claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of "privacy" can be a coat of many colors, and quite differing kinds of rights to "privacy" have been recognized in the law. Property may be "private," in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt

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My conclusion that the Act violates the principle of separation of powers is based upon three fundamental propositions. First, candid and open discourse among the President, his

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advisors, foreign heads of state and ambassadors, Members of Congress, and the others who deal with the White House on a sensitive basis is an absolute prerequisite to the effective discharge of the duties of that high office. Second, the effect of the Act, and of this Court's decision upholding its constitutionality, will undoubtedly restrain the necessary free flow of information to and from present and future Presidents. Third, any substantial intrusion upon the effective discharge of the

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tape or diary may be "private" in that sense, but may also be "private" in the sense that the Fourth Amendment would prohibit an unreasonable seizure of it even though in making such a seizure the Government agreed to pay for the fair value of the diary so as not to run afoul of the Eminent Domain Clause of the Fifth Amendment. Many states have recognized a common-law "right of privacy" first publicized in the famous Warren and Brandeis article, The Right to Privacy, 4 Harv L Rev 193 (1890). Privileges, such as the executive privilege embodied in the Constitution as a result of the separation of powers, United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974), and the attorney-client privilege, recognized under case and statutory law in most jurisdictions, protect still a different form of privacy. The invocation of such privileges has the effect of protecting the privacy of a communication made confidentially to the President or by a client to an attorney; the purpose of the privilege, in each case, is to assure free communication on the part of the confidant and of the client, respectively.

The Court states, ante, at 459, 53 L Ed 2d 901, that "it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency." Whatever the merits of this argument may be against a claim based on other types of privacy, it makes crystal clear that the Act is a serious intrusion upon the type of "privacy" that is protected by the principle of executive-privilege. The Court's complete separation of its discussion of the executive privilege claim from the privacy claim thus enables it to take inconsistent positions in the different sections of its opinion.

The Court's position with respect to the appellant's individual privacy heightens my concern regarding the privacy interest served by executive privilege. In attempting to minimize the Act's impact upon appellant's privacy, the Court concludes "purely private papers and recordings will be returned to appellant under § 104(a)(7) of the Act." Ibid. However, this conclusion raises more questions than answers. Under § 104(a)(7), the return of papers to the appellant is conditioned on their being "not otherwise of general historical significance." Given the expansive nature of this phrase, see Tr of Oral Arg 39, it is quite conceivable that virtually none of the papers will be returned, and the Court's representation is an empty gesture. See also § 104(a)(6). What is meant by *"purely* private papers"? Is a personal letter to or from the President, but concerning the duties of the President considered "private," or is a document replete with personal communications, but containing some reference to the affairs of state, "purely private"? The dictabelts of the President's personal recollections, dictated in diary form at the end of each day, are assumedly private, and are to be returned. See Tr of Oral Arg 59. But the dictabelt dictation is also recorded on the voice-activated White House taping system, and those tapes will be retained and reviewed. Hence, appellant's privacy interest will not be served by the return of the dictabelts, and the retention of the tapes will seriously erode Presidential communications, as discussed infra, at 553-558, 53 L Ed 2d 959-962. By approaching these issues in compartmentalized fashion the Court obscures the fallacy of its result.

I fully subscribe to most of what is said respecting the separation of powers in the dissent of The Chief Justice. Indeed, it is because I so thoroughly agree with his observation that the Court's holding today is a "grave repudiation of nearly 200 years of judicial precedent and historical practice" that I take this opportunity to write separately on the subject, thinking that its importance justifies such an opinion.

duties of the President is sufficient to violate the principle of separation of powers, and our prior cases do not permit the sustaining of an Act such as this by "balancing" an intrusion of substantial magnitude against the interests assertedly fostered by the Act.

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With respect to the second point, it is of course true that the Act is directed solely at the papers of former President Nixon.[2] Although the terms of the Act, therefore, have no direct application to present or future occupants of the Office, the effect upon candid communication to and from these future Presidents depends, in the long run, not upon the limited nature of the present Act, but upon the precedential effect of today's decision. Unless the authority of Congress to seize the papers of this appellant is limited only to him in some principled way, future Presidents and their advisors will be wary of a similar Act directed at their papers out of pure political hostility.

We are dealing with a privilege, albeit a qualified one, that both the Court and the Solicitor General concede may be asserted by an ex-President. It is a privilege which has been relied upon by Chief Executives since the time of George Washington. See, e.g., the dissenting opinion of The Chief Justice, ante, at 509–510, 53 L Ed 2d 932. Unfortunately, the Court's opinion upholding the constitutionality of this Act is obscure, to say the least, as to the circumstances that will justify Congress in seizing the papers of an ex-President.[3] A potpourri of reasons is advanced as to why the Act is not an unconstitutional

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infringement upon the principle of separation of powers,[4] but the

2. I am not unmindful of the excesses of Watergate, and of the impetus it gave to this legislation. However, the Court's opinion does not set forth a principled distinction that would limit the constitutionality of an Act such as this to President Nixon's papers. Absent such a distinction:
"The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us." Brewer v Williams, 430 US 387, 415, 51 L Ed 2d 424, 97 S Ct 1232 (1977) (Stevens, J., concurring).

3. Indeed, there is nothing in the Court's logic which would invalidate such an Act if it applied to an *incumbent* President *during* his term of office. It is of course not likely that an incumbent would sign such a measure, but a sufficiently determined Congress could pass it over his veto nonetheless.

4. In my view, the Court's decision itself, by not offering any principled basis for distinguishing appellant's case from that of any future President, has a present and future impact on the functioning of the Office of the Presidency. Hence the validity of the reasons asserted by the Court for upholding this particular Act is a subject which I find it unnecessary to address in detail. I feel bound to observe, however, that the Court, in emphasizing, e.g., ante, at 443–444, 53 L Ed 2d 891–892, upon the fact that the seized papers are to be lodged with the General Services Administration, an agency created by Congress but housed in the Executive Branch of the Government, relies upon a thin reed indeed.

Control and management of an agency such as the General Services Administration is shared between the incumbent President, by virtue of his authority to nominate its officials, and Congress, by virtue of its authority to enact substantive legislation defining the functions of the agency. But the physical placement of the seized Presidential papers with such an agency does not solve the separation-of-powers problem. The principle of separation of powers is infringed when, by Act of Congress, Presidential communications are impeded because the President no longer has exclusive control over the release of his confidential papers. The fact that this Act places physical custody in the hands of the General Services Administration, rather than a congressional committee, makes little difference so far as divestiture of Presidential control is concerned.

weight to be attached to any of the factors is left wholly unclear.

The Court speaks of the need to establish procedures to preserve Presidential materials, to allow a successor President access to the papers of the prior President, to grant the American public historical access, and to rectify the present "hit-or-miss" approach by entrusting the materials to the expert handling of the archivists. Ante, at 452–453, 53 L Ed 2d 897. These justifications are equally applicable to each and every future President, and other than one cryptic paragraph, ante, 453–454, 53 L Ed 2d 897, the Court's treatment contains no suggestion that Congress might not permissibly seize the papers of any outgoing future President. The unclear scope of today's opinion will cause future Presidents and their advisors to be uneasy over

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the confidentiality of their communications, thereby restraining those communications.

The position of my Brothers Powell and Blackmun is that today's opinion will not result in an impediment to future Presidential communications since this case is "unique"[5] —appellant resigned in disgrace from the Presidency during events unique in the history of our Nation. Mr. Justice Powell recognizes that this position is quite different from that of the Court. Ante, at 492–498, 53 L Ed 2d 921–925. Unfortunately his concurring view that the authority of Congress is limited to the situation he describes does not itself change the expansive scope of the Court's opinion, and will serve as scant consolation to future Presidential advisors. For so long as the Court's opinion represents a threat to confidential communications, the concurrences of Mr. Justice Powell and Mr. Justice Blackmun, I fear, are based on no more than wishful thinking.

Were the Court to advance a principled justification for affirming the judgment solely on the facts surrounding appellant's fall from office, the effect of its decision upon future Presidential communications would be far less serious. But the Court does not advance any such justification.

A

It would require far more of a discourse than could profitably be included in an opinion such as this to fully describe the pre-eminent position that the President of the United States occupies with respect to our Republic. Suffice it to say that the President is made the sole repository of the executive powers of the United States, and the powers entrusted to him as well as the duties imposed upon him

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are awesome indeed.[6] Given the vast spectrum of

5. My Brother Stevens, ante, at 486–487, seeks to attribute a similar uniqueness to the precedential value of this case, but his observations are directed to appellant's bill-of-attainder claim, rather than to the separation-of-powers claim.

6. Article II empowers him "by and with the Advice and Consent of the Senate" to make treaties, to appoint numerous other high officials of the Federal Government, to receive ambassadors and other public ministers, and to commission all the officers of the United States. That Article enjoins him to "take Care that the Laws be faithfully executed," and authorizes him to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." It is difficult to imagine a public office whose occupant would be more dependent upon the confidentiality of the advice which he received, and the confidentiality of the instructions which he gave, for the

the decisions that confront him—domestic affairs, relationships with foreign powers, direction of the military as Commander in

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Chief—it is by no means an overstatement to conclude that current, accurate, and absolutely candid information is essential to the proper performance of his office. Nor is it an overstatement to conclude that the President must be free to give frank and candid instructions to his subordinates. It cannot be denied that one of the principal determinants of the quality of the information furnished to the President will be the degree of trust placed in him by those who confide in him. The Court itself, ante, at 448–449, 53 L Ed 2d 894, cites approvingly the following language of the Solicitor General:

> " 'Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submission of facts and opinions upon which effective discharge of his duties depends.' " See Brief for Federal Appellees 33.

The public papers of Dwight D. Eisenhower, who had the advantage of discharging executive responsibilities first as the Commander in Chief of the United States forces in Europe during the Second World War and then as President of the United States for two terms, attest to the critical importance of this trust in the President's discretion:

> "And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis." Public Papers of the President of the United States: Dwight D. Eisenhower, 1955, p 674 (1959).

The effect of a contrary course likewise impressed President Eisenhower:

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successful execution of his duties. This is particularly true in the area of foreign affairs and international relations; in United States v Curtiss-Wright Corp. 299 US 304, 319, 81 L Ed 255, 57 S Ct 216 (1936), this Court stated:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong, col 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

" 'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' U. S. Senate, Reports, Committee on Foreign Relations, vol 8, p 24."

"But when it comes to the conversations that take place
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between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, *and if they are, will wreck the Government.*" Ibid. (Emphasis added.)

There simply can be no doubt that it is of the utmost importance for sensitive communications to the President to be viewed as confidential, and generally unreachable without the President's consent.

B

In order to fully understand the impact of this Act upon the confidential communications in the White House, it must be understood that the Act will affect not merely former President Nixon, but the present President and future Presidents. As discussed above, while this Act itself addresses only the papers of former President Nixon, today's decision upholding its constitutionality renders uncertain the constitutionality of future congressional action directed at any ex-President. Thus Presidential confidants will assume, correctly, that any records of communications to the President could be subject to "appropriation" in much the same manner as the present Act seized the records of confidential communications to and from President Nixon. When advice is sought by future Presidents, no one will be unmindful of the fact that, as a result of the uncertainty engendered by today's decision, all confidential communications of any ex-President could be subject to seizure over his objection, as he leaves the inaugural stand on January 20.

And Presidential communications will undoubtedly be impeded by the recognition that there is a substantial probability of public disclosure of material seized under this Act, which, by today's decision, is a constitutional blueprint for future Acts. First, the Act on its face requires that 100-odd Government archivists study and review Presidential papers,
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heretofore accessible only with the specific consent of the President. Second, the Act requires that public access is to be granted by future regulations consistent with "the need to provide public access to those materials which have general historical significance . . . ." § 104(a)(6). Either of these provisions is sufficient to detract markedly from the candor of communications to and from the President.

In brushing aside the fact that the archivists are empowered to review the papers, the Court concludes that the archivists will be discreet. Ante, at 451–452, 53 L Ed 2d 896. But there is no foundation for the Court's assumption that there will be no leaks. Any reviews that the archivists have made of Presidential papers in the past have been done only after authorization by the President, and after the President has had an opportunity to cull the most sensitive documents. It strikes me as extremely naive, and I daresay that this view will be shared by a large number of potential confidants of future Presidents, to suppose that each and every one of the archivists who might participate in a similar screening by virtue of a future Act would remain completely silent with respect to those portions of the Pres-

idential papers which are extremely newsworthy. The Solicitor General, supporting the constitutionality of the Act, candidly conceded as much in oral argument:

> "Question: . . . I now ask you a question that may sound frivolous, but do you think if a hundred people know anything of great interest in the City of Washington, it will remain a secret?
>
> "[Laughter.]
>
> "Mr. McCree: Mr. Justice Powell, I have heard that if two people have heard it, it will not," Tr of Oral Arg 46.

It borders on the absurd for the Court to cite our recent decision in Whalen v Roe, 429 US 589, 51 L Ed 2d 64, 97 S Ct 869 (1977), as a precedent for the proposition that Government officials will invariably

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honor provisions in a law dedicated to the preservation of privacy. It is quite doubtful, at least to my mind, that columnists or investigative reporters will be avidly searching for what doctor prescribed what drug for what patient in the State of New York, which was the information required to be furnished in Whalen v Roe. But with respect to the advice received by a President, or the instructions given by him, on highly sensitive matters of great historical significance, the case is quite the opposite. Hence, at the minimum, today's decision upholding the constitutionality of this Act, mandating review by archivists, will engender the expectation that future confidential communications to the President may be subject to leaks or public disclosure without his consent.

In addition to this review by archivists, Presidential papers may now be seized and shown to the public if they are of "general historical significance." The Court attempts to avoid this problem with the wishful expectation that the regulations regarding public access, when promulgated, will be narrowly drawn. However, this assumes that a Presidential advisor will speak candidly based upon this same wishful assumption that the regulations, when ultimately issued and interpreted, will protect his confidences. But the current Act is over two and one-half years old and no binding regulations have yet been promulgated. And it is anyone's guess as to how long it will take before such ambiguous terms as "historical significance" are definitively interpreted, and as to whether some future Administrator as yet unknown might issue a broader definition. Thus, the public access required by this Act will at the very least engender substantial uncertainty regarding whether future confidential communications will, in fact, remain confidential.

The critical factor in all of this is not that confidential material might be disclosed, since the President himself might choose to "go public" with it. The critical factor is that the determination as to whether to disclose is wrested by the

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Act from the President. When one speaks in confidence to a President, he necessarily relies upon the President's discretion not to disclose the sensitive. The President similarly relies on the discretion of a subordinate when instructing him. Thus it is no answer to suggest, as does the Court, ante, at 450–451, 53 L Ed 2d 895, that the expectation of confidentiality has always been limited because Presidential papers have in the past been turned over to Presidential libraries

or otherwise subsequently disclosed. In those cases, ultimate reliance was upon the discretion of the President to cull the sensitive ones before disclosure. But when, as is the case under this Act, the decision whether to disclose no longer resides in the President, communication will inevitably be restrained.

The Court, as does Mr. Justice Powell, seeks to diminish the impact of this Act on the Office of the President by virtue of the fact that neither President Ford nor President Carter supports appellant's claim. Ante, at 441, 53 L Ed 2d 890, 502 n 5, 53 L Ed 2d 928. It is quite true that President Ford signed the Act into law, and that the Solicitor General, representing President Carter, supports its constitutionality. While we must give due regard to the fact that these Presidents have not opposed the Act, we must also give due regard to the unusual political forces that have contributed to making this situation "unique." Ante, at 494, 53 L Ed 2d 923 (Powell, J., concurring). Mr. Justice Powell refers to the stance of the current Executive as "dispositive," ante, at 498, 53 L Ed 2d 925, and the Court places great emphasis upon it. I think this analysis is mistaken.

The current occupant of the Presidency cannot by signing into law a bill passed by Congress waive the claim of a successor President that the Act violates the principle of separation of powers. We so held in Myers v United States, 272 US 52, 71 L Ed 160, 47 S Ct 21 (1926). And only last Term we unanimously held in Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976), that persons with no connection with the Executive Branch of the Government may attack the constitutionality of a law signed by the President on the

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ground that it invaded authority reserved for the Executive Branch under the principle of separation of powers. This principle, perhaps the most fundamental in our constitutional framework, may not be signed away by the temporary incumbent of the office which it was designed to protect.

Mr. Justice Powell's view that the incumbent President must join the challenge of the ex-President places Presidential communications in limbo, since advisors, at the time of the communication, cannot know who the successor will be or what his stance will be regarding seizure by Congress of his predecessor's papers. Since the advisors cannot be sure that the President to whom they are communicating can protect their confidences, communication will be inhibited. Mr. Justice Powell's view, requiring an ex-President to depend upon his successor, blinks at political and historical reality. The tripartite system of Government established by the Constitution has on more than one occasion bred political hostility not merely between Congress and a lame duck President, but between the latter and his successor. To substantiate this view one need only recall the relationship at the time of the transfer to the reins of power from John Adams to Thomas Jefferson, from James Buchanan to Abraham Lincoln, from Herbert Hoover to Franklin Roosevelt, and from Harry Truman to Dwight Eisenhower. Thus while the Court's decision is an invitation for a hostile Congress to legislate against an unpopular lame duck President, Mr. Justice Powell's position places the ultimate disposition of a chal-

lenge to such legislation in the hands of what history has shown may be a hostile incoming President. I cannot believe that the Constitution countenances this result. One may ascribe no such motives to Congress and the successor Presidents in this case, without nevertheless harboring a fear that they may play a part in some succeeding case.

The shadow that today's decision casts upon the daily operation of the Office of the President during his entire

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four-year term sharply differentiates it from our previous separation-of-powers decisions, which have dealt with much more specific and limited intrusions. These cases have focused upon unique aspects of the operation of a particular branch of Government, rather than upon an intrusion, such as the present one, that permeates the entire decision-making process of the Office of the President. For example, in Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (1952) (Steel Seizure Cases), this Court held that the President could not by Executive Order seize steel mills in order to prevent a work stoppage when Congress had provided other methods for dealing with such an eventuality. In Myers v United States, supra, the Court struck down an 1876 statute which had attempted to restrict the President's power to remove postmasters without congressional approval. In Buckley v Valeo, supra, the Court struck down Congress' attempt to vest the power to appoint members of the Federal Election Commission in persons other than the President.

To say that these cases dealt with discrete instances of governmental action is by no means to disparage their importance in the development of our constitutional law. But it does contrast them quite sharply with the issue involved in the present case. To uphold the Presidential Recordings and Materials Preservation Act is not simply to sustain or invalidate a particular instance of the exercise of governmental power by Congress or by the President; it has the much more far-reaching effect of significantly hampering the President, during his entire term of office, in his ability to gather the necessary information to perform the countless discrete acts which are the prerogative of his office under Art II of the Constitution.

C

It thus appears to me indisputable that this Act is a significant intrusion into the operations of the Presidency.

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I do not think that this severe dampening of free communication to and from the President may be discounted by the Court's adoption of a novel "balancing" test for determining whether it is constitutional.[7] I agree with the Court that

7. As a matter of original inquiry, it might plausibly be claimed that the concerns expressed by the Framers of the Constitution during their debates, and similar expressions found in the Federalist Papers, by no means require the conclusion that the Judicial Branch is the ultimate arbiter of whether one branch has transgressed upon powers constitutionally reserved to another. It could have been plausibly maintained that the Framers thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.

Marbury v Madison, 1 Cranch 137, 2 L Ed

the three branches of Government need not be airtight, ante, at 443, 53 L Ed 2d 891, and that the separate branches are not intended to operate
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with absolute independence, United States v Nixon, 418 US 683, 707, 41 L Ed 2d 1039, 94 S Ct 3090 (1974). But I find no support in the Constitution or in our cases for the Court's pronouncement that the operations of the Office of the President may be severely impeded by Congress simply because Congress had a good reason for doing so.

Surely if ever there were a case for "balancing," and giving weight to the asserted "national interest" to sustain governmental action, it was in the Steel Seizure Cases, supra. There the challenged Presidential Executive Order recited, without contradiction by its challengers, that "American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea"; that "the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials"; and that a work stoppage in the steel industry "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." 343 US, at 590–591, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (App to opinion). Although the "legislative" actions by the President could have been quickly overridden by an Act of Congress, id., at 677, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378 (Vinson, C. J., dissenting), this Court struck down the Executive Order as violative of the separation-of-powers principle with nary a mention of the national interest to be fostered by what could have been characterized as a relatively minimal and temporary intrusion upon the role of Congress. The analysis was simple and straightforward: Congress had exclusive authority to legislate; the President's Executive

60 (1803), not only established the authority of this Court to hold an Act of Congress unconstitutional, but the particular constitutional question which it decided was essentially a "separation of powers" issue: whether Congress was empowered under the Constitution to expand the original jurisdiction conferred upon this Court by Art III of the Constitution.

Any argument that Marbury is limited to cases involving the powers of the Judicial Branch and that the Court had no power to intervene in any dispute relating to separation of powers between the other two branches has been rejected in Myers v United States, 272 US 52, 71 L Ed 166, 47 S Ct 21 (1926); Humphrey's Executor v United States, 295 US 602, 79 L Ed 1611, 55 S Ct 869 (1935), and Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976). In so doing, these cases are entirely consistent with the following language from United States v Nixon:

"In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v Madison, 1 Cranch 137, [2 L Ed 60] (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Id., at 177, [2 L Ed 60]." 418 US, at 703, 41 L Ed 2d 1039, 94 S Ct 3090.

Order was an exercise of legislative power that impinged upon that authority of Congress, and was therefore unconstitutional. Id., at 588–589, 96 L Ed 1153, 72 S Ct 863, 47 Ohio Ops 430, 62 Ohio L Abs 417, 26 ALR2d 1378. See also Buckley v Valeo.[8]

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I think that not only the Executive Branch of the Federal Government, but the Legislative and Judicial Branches as well, will come to regret this day when the Court has upheld an Act of Congress that trenches so significantly on the functioning of the Office of the Presidency. I dissent.

8. For the reasons set forth by The Chief Justice, ante, at 512, 53 L Ed 2d 934, it is clear that the circumstances in United States v Nixon, involving a narrow request for specified documents in connection with a criminal prosecution, provide no support for the Court's use of a balancing test in a case such as this where the seizure is a broad and undifferentiated intrusion into the daily operations of the Office of the President.

EDITOR'S NOTE

An annotation on "Supreme Court's views as to what constitutes a bill of attainder prohibited by Federal Constitution," appears p 1273, infra.